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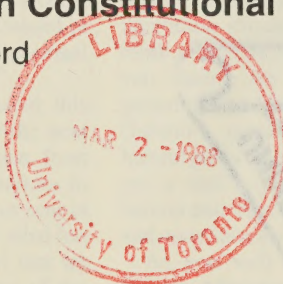
# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### Select Committee on Constitutional Reform

1987 Constitutional Accord



#### First Session, 34th Parliament

Tuesday, February 2, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, February 2, 1988**

The committee met at 10:13 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

**Mr. Chairman:** The chair sees a quorum. With the storm this morning, I think a number of us had interesting drives into the city. We apologize for the slight delay in getting this morning's proceedings under way.

Today begins the first of a series of public meetings the committee will be holding during this month and the month of March. We have received a very large number of requests, some 100 to 120, to appear before the committee and we are endeavouring to ensure that everyone who has requested to appear before the committee will have an opportunity to do so.

I thought that before beginning this morning it would be appropriate just to read the resolution that has asked this committee to undertake the work it is beginning today.

The resolution reads, "That a select committee on constitutional reform be appointed to consider and report on the 1987 constitutional accord, signed at Ottawa on June 3, 1987, and tabled in the House on November 23, 1987 (sessional paper 74), and matters related thereto."

That is the motion which has created this committee and it is our intention, over the next weeks and months, to endeavour to hear from those who have asked to make presentations to us, to read the various briefs people have sent in to us and then to consider very carefully what has been submitted and to bring in a report that we have been asked to submit by the end of the spring session.

Dans nos délibérations, nous aurons la traduction simultanée et nous savons fort bien qu'il y aura des francophones qui vont présenter leurs mémoires devant nous. Donc, nos séances, ici et à Ottawa, vont se dérouler dans les deux langues.

We felt that this week it would be particularly useful for the committee to hear from a number of witnesses to place the accord in context and to begin to look at some of the different viewpoints on it. To begin today, I want to welcome representatives from the Ministry of Intergovernmental Affairs. We have asked them to provide us with a historical context. Dr. David Cameron is the deputy minister and Mr. Donald Stevenson, who is beside Dr. Cameron, is the Ontario

representative to Quebec and to Ottawa. Without further ado, Dr. Cameron, perhaps I can turn the meeting over to you and you can set out how you would like to proceed this morning.

### MINISTRY OF INTERGOVERNMENTAL AFFAIRS

**Dr. Cameron:** Thank you very much, Mr. Chairman. I would like first of all to thank you and your colleagues for the opportunity to appear before the committee today. You have in front of you a copy of the submission we are going to be presenting to you. It is not meant to stun you with its size. It is in large print and is double-spaced and I hope it will not take us too long to go through it. Our intention is really to read that into the record as our opening statement, with the understanding there would be an opportunity for questions subsequently.

**Mr. Chairman:** Please go ahead.

**Dr. Cameron:** Before beginning my remarks, I would like to introduce Don Stevenson. This seems singularly inappropriate; I think Don Stevenson should be introducing me because I think he has become known to a great many of you during his career here in the Ontario government. He is currently, as you know, Ontario's representative to Quebec and the federal government and has had an opportunity to get a bird's-eye view of many of the issues behind and surrounding the Meech Lake accord and constitutional discussion.

As you well know, he has formerly been Deputy Minister of Intergovernmental Affairs and has extensive experience in constitutional negotiations and a very thorough knowledge of Quebec. We have asked Don to participate in the presentation this morning and I will be turning the floor over to him subsequently, after I have made some opening remarks. I will then close with some remarks at the end.

As the first witnesses to address the select committee, Don and I hope to place the accord in its historical setting and to provide a perspective on the process of constitutional negotiations and reform. I understand that the Attorney General (Mr. Scott) will be invited to testify before this committee on the substantive aspects of the accord, including the legal impact of its specific clauses.



## 1020

In a moment, Don Stevenson will review the key historical events of the past two decades and attempt to convey our understanding of the context within which this accord was negotiated. I will then trace the origins of the specific constitutional amendments called for by the accord. First, I have a few initial observations on the importance of constitutional reform.

If there is a common theme to our remarks today it is this: The Meech Lake accord completes one stage in a continuing process of political and constitutional discussion that began in the mid-1960s. More specifically, Meech Lake represents an occasion when all of Canada's governments, federal and provincial, agreed to make the establishment of a satisfactory place for Quebec within Canada the central objective of constitutional discussion. This objective was achieved and, thus, the major piece of unfinished business left over from the 1980-to-1982 round of constitutional reform was completed.

Comme je viens de le dire, si l'on voulait donner un thème central à notre intervention d'aujourd'hui, on choisirait le suivant: L'entente du lac Meech permet de compléter le processus de discussion politique et constitutionnelle entrepris au milieu des années 60. Plus précisément, l'entente marque l'occasion où tous les gouvernements du Canada, fédéral aussi bien que provinciaux, se sont entendus pour centrer leur négociations constitutionnelles sur la nécessité d'accorder au Québec une place satisfaisante au sein du pays. Cet objectif a été atteint et, ce faisant, le Canada a réussi à compléter la tâche qui était restée inachevée lors des discussions sur la réforme constitutionnelle de 1980-1982.

The post-war period in Canada has been characterized by rapid social and economic change on a variety of fronts. As our country has matured, the political system, including the Constitution, has served to articulate and reconcile the many identities and priorities of a people in transition. The status of Canada's aboriginal peoples has re-emerged in recent years as a matter of pressing contemporary concern. Large numbers of immigrants have chosen Canada as their home, making this country an increasingly pluralistic and dynamic society. In addition, this has been a period of increased participation of women in the economic and political life of Canada.

Within this evolving community of Canadians, new identities and new social forces are woven into the earlier traditions of Canada as a country of distinct regions, two languages and

predominantly European origins. Within this complex pattern, three forces have been especially significant in shaping public debate in the last several decades. Day-to-day intergovernmental relations and the recent phase of constitutional reform, reflect the interplay of these forces, as does the Meech Lake accord.

I am referring here to the forces of Canadian nation-building, regionalism and English-French duality. Each of these three forces springs from the desire of Canadians to give expression to their individual identities and to the values of the communities to which they belong. We take a moment to define these here because that really provides a structure for the subsequent remarks that we are advancing:

Canadian nation-building refers of course to our loyalty to the national institutions and symbols which characterize the nation as a whole and provide the framework of Canada's diverse society.

Regionalism is the identification of Canadians with the particular geographic area in Canada and its characteristic culture and values. It has found political expression in recent years chiefly through provincial governments.

Finally, duality has two aspects. It has a Canada-wide expression which promotes the co-existence of English and French linguistic communities throughout the country and it also refers to the recognition of the language, culture and institutions of Quebec as a distinct community within Canada and as the foyer or the homeland of French-language civilization in North America.

Canada's post-war experience has shown the difficulty of maintaining a delicate balance among these forces. As our society evolves and new pressures arise, Canadians are then called upon to work together to reach a new accommodation. A measure of Canada's political health to date is the degree to which the country has been able to accommodate the forces of nation-building, regionalism and duality.

A major element of this accommodation has been constitutional in character. This is not surprising given the growing importance of the Constitution, not only in defining the scope of government powers and the rights of individuals, but also in providing a guiding statement of the fundamental values of our society.

Canadians have shown increasing interest in their Constitution and in constitutional reform during recent decades. The interest shown by Ontarians in the Meech Lake accord and, indeed, in these hearings suggests that public involve-



ment in a living Constitution will continue to be a feature of the politics of our society.

The accord is set in the complex evolution of post-war Canadian history. While the Meech Lake accord does not attempt to address the full range of constitutional issues, it is nevertheless the culmination of a major period in our constitutional evolution which saw the attempt, commenced in 1967, to define Quebec's place in the federation and to achieve a just balance in Canada among the three forces that I have indicated.

I now am going to turn the floor over to Don Stevenson. He will review the historical events and intergovernmental negotiations which led to the 1987 accord and look as well at the significance of the accord for the government and the people of Quebec. I will call on Don Stevenson to continue.

**Mr. Stevenson:** Thank you very much. I should add, Mr. Chairman, for the benefit of the committee, that David himself is no stranger to constitutional affairs. Ten years ago I had a fair bit to do with him when he was the research director of the Pepin-Robarts commission, so you might keep in mind that he is not a neophyte.

I would like very much to thank the select committee for the opportunity to appear today. As you know, Mr. Chairman, I have worked in the field of federal-provincial and Ontario-Quebec relations for quite a considerable time here. At present, I serve as the Ontario government's representative to Quebec and the federal government.

I am therefore pleased to be able to share with the select committee my sense of the historical developments in intergovernmental negotiations which led to the accord and to report to the committee some of the feelings and reactions which Quebecers have expressed concerning the accord.

In his opening remarks, David Cameron discussed the changing nature of Canadian society during the post-war period and referred to three political forces which have had a particular impact on our constitutional development. These are nation-building, duality and regionalism. My remarks today will deal with the two major constitutional agreements of this decade—the 1981 agreement among Prime Minister Trudeau and all of the provincial premiers but Quebec, and the 1987 agreement at Meech Lake—in the context of these forces.

The essential point of my remarks is that the agreement to entrench the Constitution Act, 1982, with an amending formula and Charter of

Rights gave constitutional expression to Canadian nation-building, to the strong regional identities of Canada and to the pan-Canadian aspect of duality—that is to say, the entrenchment of protection of language rights in national institutions and in provinces.

Ironically, however, the 1982 amendments did not address adequately Quebec's place in the federation, which was the driving force behind the current phase of constitutional discussions, which began in the 1960s. The Constitution Act, 1982, despite its important achievements, did not deal with some critical tensions and divisions in this country. The Meech Lake constitutional accord is, as has been said, an attempt to deal with this unfinished business.

La Loi constitutionnelle de 1982, avec sa formule de modification et sa Charte des droits, a permis de donner une expression constitutionnelle au concept du développement de la nation canadienne, de même qu'au sentiment d'identité régionale et à l'aspect pancanadien de la dualité, c'est-à-dire la reconnaissance et la protection des droits linguistiques au sein des institutions nationales et provinciales.

Mais les amendements de 1982 n'ont pas su répondre radicalement à la question de la place réservée au Québec dans la fédération, question qui constituait le moteur du débat constitutionnel entrepris depuis les années 60. Malgré ces importantes réalisations, la Loi constitutionnelle de 1982 ne parvenait donc pas à soulager certaines des tensions qui divisaient le pays. Or, l'entente du lac Meech, elle, se veut une façon d'achever cette tâche.

The desire to patriate the Canadian Constitution and to institute a formula whereby the Constitution could be amended here in Canada is not, of course, a new idea. Canadians have sought to enshrine the elements of full national sovereignty through constitutional reform for at least the last 60 years. Most of these attempts ended in failure, however, because of concerns in the provinces, and Quebec in particular, that duality and regionalism were not reflected adequately in the constitutional proposals.

## 1030

The phase of constitutional discussions which has culminated in the Meech Lake accord has its roots in the mid-1960s. During this period, Quebec nationalism was on the rise, and many Quebecers supported a major transfer of federal power to Quebec as the only acceptable alternative to independence. In 1965, the Royal Commission on Bilingualism and Biculturalism concluded that a crisis existed in Canada between



the two linguistic communities and between Quebec and the rest of the country. Its report called for the protection of minority language rights and for a comprehensive set of reforms to the Constitution.

In response to the B and B report and the tense situation in Quebec, the then Premier of Ontario, John Robarts, convened the Confederation of Tomorrow Conference in 1967. I have a copy of the proceedings here for anybody who is interested. The conference addressed the report's proposals for bilingualism and the broader question of Quebec's place in the federation. The Ontario government's role in this conference was very much in the tradition of our historic nation-building partnership with the province of Quebec. The conference concluded with a declaration which called for a comprehensive constitutional review.

It is interesting to note that the same week that John Robarts and Daniel Johnson and their fellow provincial premiers were beginning the search for an accommodation at the Confederation of Tomorrow Conference, leading Quebec nationalists met at the Estates General of French Canada. That conference called for a constitutional solution involving virtual sovereignty for Quebec. Such proposals were typical of some of the radical calls for reform of the period and stand in contrast to the set of reforms agreed to by Premier Bourassa and the other first ministers at Meech Lake.

At the first federal-provincial constitutional conference in 1968, the federal government presented to the provinces a three-stage plan for reform. This plan anticipated much of the activity of the subsequent 20 years. It called, as the first order of business, for consideration of a bill of rights to protect the individual liberties of all Canadians. This would be followed by a review of the central institutions of federalism, after which attention would be given to adjusting the federal-provincial distribution of powers. The conference also considered the entrenchment of minority language rights as recommended by the report of the Royal Commission on Bilingualism and Biculturalism.

However, not all provinces agreed with this set of priorities and proposals. Quebec took the position that the first priority was adjusting the federal-provincial distribution of powers and the western provinces expressed opposition to some of the proposals for bilingualism. In addition, much of the conference was devoted to the issue of regional economic disparities, as was, I might say, the Confederation of Tomorrow Confer-

ence. Thus, no new accommodation was reached among the forces of nation-building, duality and regionalism.

Little progress was made until the constitutional conference of February 1971. At this conference, the outlines of an initial constitutional accommodation emerged when Quebec agreed to lend its support to a new amending formula and the entrenchment of human rights, in return for extended provincial powers in the area of social policy, I might add, as a first step.

In June 1971, at the Victoria conference, it appeared that a constitutional agreement was at hand. The Victoria charter, which was accepted by all the first ministers, called for a formula for the patriation and amendment of the Canadian Constitution, the constitutional entrenchment of human rights, the entrenchment of language rights in all but the three westernmost provinces, a guarantee of three Quebec judges on the Supreme Court of Canada, a limitation on federal powers in the area of social policy, the repeal of the federal power to reserve or disallow provincial legislation and an annual conference of the first ministers.

Many of the elements of the Victoria charter are to be found in the constitutional agreements of 1981 and 1987. The Constitution Act of 1982 patriated the Constitution with an amending formula, a Charter of Rights and guarantees of minority language rights. The Meech Lake accord proposes to guarantee Quebec's representation on the Supreme Court, clarify the federal government's spending power in areas of provincial jurisdiction and entrench first ministers' conferences.

As we all know, the Victoria proposals collapsed when Premier Bourassa returned home to face the strenuous opposition of Quebec nationalists. They objected to the failure of the Victoria charter to deal with Quebec's historical concerns about the distribution of powers, particularly in the area of social security. Premier Bourassa rejected the Victoria charter on June 23, 1971.

Attempts by the federal government to revive the process of constitutional reform met with limited success through the balance of the decade. The federal government's October 1974 speech from the throne, which called for a limited package of amendments including patriation and the Victoria amending formula, was opposed by Quebec because, like the Victoria charter, it did not include any adjustment of federal and provincial legislative powers.



This proposal was made once more by Prime Minister Trudeau at the 1975 first ministers' conference and in letters to the provincial premiers in March 1976, but the provinces insisted that patriation would be acceptable only as part of a package of comprehensive reform. At the annual premiers' conferences of 1975 and 1976, the positions of the provinces on patriation hardened.

At the conclusion of the Edmonton conference of August 1976, Premier Lougheed of Alberta informed Prime Minister Trudeau on behalf of the premiers that although patriation was desirable, it would not meet with provincial agreement unless the distribution of powers was altered to expand provincial jurisdiction with respect to culture, immigration, communications and taxation of natural resources. In addition, the premiers called for the limitation of the federal declaratory and spending powers, and direct requirement that the creation of new provinces be subject to the general amending formula.

In the Quebec election of November 15, 1976, the Parti québécois swept into power on a platform calling for sovereignty-association for the province. This was a tremendously significant event which raised a serious possibility that Quebec would secede from the Canadian federation. The election of the Parti québécois brought home to many Canadians the need for new constitutional arrangements while making any real prospect of rapid constitutional reform more remote.

Two other events at the end of 1976 further complicated the immediate prospects for federal-provincial agreement on constitutional reform. British Columbia took the position that it should be defined as a separate region with a veto on constitutional change. In Alberta, the government withdrew its support for the Victoria amending formula which, by the way, was a formula that required regional support: two provinces in the west, two of the Atlantic provinces, plus Ontario and Quebec. The Alberta government instead called for unanimous provincial consent for constitutional amendments.

In 1977, Prime Minister Trudeau reaffirmed that patriation was his government's constitutional priority. In that year, his government appointed the Task Force on Canadian Unity, chaired by Jean-Luc Pepin and former Ontario Premier John Robarts. In January 1979, the task force unanimously recommended a wide-ranging constitutional reform package which focused on accommodation of regional differences and a

new relationship of Quebec within Canada. Here is a copy of that one.

By 1978, the Trudeau government was determined to proceed with a package of constitutional reform, with or without provincial consent. In June, a white paper entitled *A Time For Action* and a constitutional amendment bill known as Bill C-60 were introduced in Parliament. The white paper and the bill set out the federal government's intention to proceed with several aspects of reform that it believed to be within its jurisdiction.

Bill C-60 proposed the adoption of a Charter of Rights and Freedoms which would apply within federal jurisdiction with a provision for provinces to opt in, the constitutional protection of language rights, a mechanism for provincial participation in the appointment of Supreme Court of Canada judges, plus a guarantee of four places on the court for Quebec, and the replacement of the Senate by a House of the Federation, of which half the members would be appointed by the provincial governments and half by the federal government.

A first ministers' conference on the Constitution was held in November 1978. The provinces could not agree on the entrenchment of individual liberties and language rights in the Constitution and expressed disapproval of the federal Bill C-60. The bill was then referred by the federal government to the Supreme Court of Canada for an opinion on its constitutionality. On December 21, 1979, the Supreme Court of Canada confirmed that the federal government's powers to amend the Constitution under the British North America Act were limited to matters which affected the federal government. In the court's opinion, several of the constitutional amendments proposed in Bill C-60 were outside the scope of the unilateral federal amending power, and the bill was therefore unconstitutional in these respects.

#### 1040

The Quebec referendum took place in the spring of 1980. We all know what a significant event the referendum was for the people of Quebec and Canada. During the campaign, Prime Minister Trudeau promised that he would respond to a "no" vote with an initiative to reform the Constitution and address the aspirations of Quebecers within a renewed federalism. Several provincial premiers, including Premier Davis of Ontario, echoed this theme.

On May 20, 1980, the Quebec electorate rejected the Parti québécois request for a mandate to negotiate sovereignty-association with Canada



by a vote of 60 per cent to 40 per cent. Within three weeks, the first ministers met in Ottawa and mandated their negotiators to begin a new series of discussions on comprehensive constitutional reform. While considerable progress was made over the summer, no agreement was reached at the first ministers' conference held in September 1980. Again, the Prime Minister and the premiers were unable to find a satisfactory accommodation among nation-building, regionalism and duality.

After the failure of the September conference, the Trudeau government decided it would proceed with its constitutional agenda unilaterally. On October 2, 1980, the federal government tabled a constitutional resolution that would have patriated the Constitution with an amending formula, a Charter of Rights and protections for minority languages. All of the provinces, with the exception of Ontario and New Brunswick, opposed the unilateral federal action. The governments of Quebec, Manitoba and Newfoundland referred the federal resolution to their courts of appeal for an opinion on its constitutionality. These opinions were then appealed to the Supreme Court of Canada.

On September 28, 1981, the Supreme Court rendered its opinion in the patriation reference on national television. The Supreme Court upheld the legality of the federal resolution. However, the court also stated that the attempt to amend the Constitution unilaterally was unconstitutional in the conventional sense, because it lacked a substantial degree of provincial support.

This judgement had the effect of forcing the federal and provincial governments back to the bargaining table. At the historic constitutional conference of November 1981, the Prime Minister finally reached an accommodation with nine of the provinces on a reform package which included patriation of the Constitution with an amending formula, a Charter of Rights and Freedoms and protections for the two official languages. However, it was not agreed to by Quebec.

The Constitution Act 1982 was proclaimed by the Queen in a celebration in Ottawa on April 17, 1982. It confirmed Canada's full independence by removing at last the anachronistic requirement of returning to Westminster to amend the Canadian Constitution. The 1982 Constitution reinforced the national identity of Canadians by providing a statement of our national ideals in the Charter of Rights and Freedoms. The charter not only protected Canadians' individual liberties from oppressive state action, but recognized and

reinforced the rights of women, the aboriginal peoples and the multicultural nature of Canada. It also provided protection for the two official languages of Canada.

It also addressed the Canada-wide dimension of duality by providing protection for the two official languages of Canada and for minority-language education rights.

The compromise struck by the first ministers also addressed the issue of regionalism in Canada. The act included an amending formula which recognized the principle of equality among provinces, a provincial right to opt out of constitutional amendments transferring provincial powers to the federal government, a requirement for unanimity to amend the Constitution with respect to a short list of national institutions, and a right of governments to declare legislation operative notwithstanding certain provisions of the Charter of Rights and Freedoms.

Thus, the 1982 amendments gave constitutional expression to nation-building, regionalism and to the pan-Canadian aspect of duality. They also recognized aboriginal and sexual equality rights and the multicultural nature of Canadian society. However, the amendments did not address the central question of Quebec's place within Canada. On April 17, 1982, flags in Quebec were flown at half-mast. In the eyes of many Quebecers, the new amending formula arbitrarily took away the historical constitutional veto of the government of Quebec and subjected Quebec's future place in the federation to the discretion of the other provinces.

The Canadian Charter of Rights and Freedoms was viewed as stripping the provincial government of its full powers to protect the French language and culture in Quebec and as subjecting provincial legislation to a set of federally imposed standards.

Furthermore, the 1982 package of amendments did nothing to address Quebec's desire to be recognized as a distinct society, nor did it deal with the province's long-standing concerns about the distribution of powers in areas such as immigration and the federal spending power.

The changes to the powers of the Quebec government were imposed on the government of Quebec without its consent. Even though the changes were legally binding, some residents of that province viewed them as illegitimate. Thus the constitutional reform of 1982 did not adequately reflect the values and aspirations of a significant part of the Canadian population residing in Quebec. Although it was a tremendous act of nation-building for most Canadians,

the 1982 reforms did not bring the Québécois community into an accommodation with the rest of the country.

The Quebec government felt betrayed and disillusioned after the events of 1981 and 1982 and refused to participate in the federal-provincial conferences of the early 1980s and mid-1980s. The isolation of Quebec had a highly detrimental effect on the conduct of intergovernmental relations during this period. For example, one impact of Quebec's absence from the constitutional bargaining table was to reduce significantly the chances for success of the series of first ministers' conferences on aboriginal rights. Without Quebec's support, it was much more difficult to achieve the necessary consensus for an amendment guaranteeing aboriginal self-government. In addition, the Parti québécois government systematically invoked the notwithstanding clause to suspend the protections of the Canadian Charter of Rights and Freedoms in respect of all its legislation.

In the federal election of September 1984, Prime Minister Mulroney won a large majority in the House of Commons. During the campaign, he promised a new effort to reform the Constitution and bring Quebec back into the Canadian family.

The defeat in December 1985 of the Parti québécois government by Robert Bourassa's Liberals created the conditions for an accommodation with Quebec. The Liberal Party also campaigned on a commitment to restore Quebec's role and stature in the federation through a program of constitutional reform. The main elements of the reforms proposed by the party included recognition of the duality of Canada, guarantees for Quebec's cultural security and an updating of the federal system to take into account Quebec's interests with respect to the Supreme Court, the Senate and the distribution of powers.

In a symposium held at Mont-Gabriel in May 1986, Quebec's Minister Responsible for Canadian Intergovernmental Affairs clarified Quebec's requirements for adherence to the constitutional settlement of 1982. Quebec's proposals were recognition of Quebec as a distinct society; a greater provincial role in immigration; a provincial role in appointments to the Supreme Court of Canada; limitations to the federal spending power; and restoration of Quebec's veto on constitutional amendments.

At the annual premiers' conference held in Edmonton in August 1986, the provincial premiers unanimously declared in their commun-

iqué that the first priority for constitutional reform was to commence federal-provincial negotiations on the basis of Quebec's constitutional proposals, after which discussions would proceed on other issues including Senate reform and fisheries. This agreement to hold a Quebec round of discussions, based on its five conditions, was confirmed in a communiqué by all 11 first ministers at the November 1986 first ministers' conference in Vancouver.

During the ensuing winter and spring, a series of bilateral discussions was held across the country between federal and Quebec negotiators and their provincial counterparts in order to prepare first ministers for their upcoming discussions.

At the meeting at Meech Lake on April 30, 1987, the first ministers reached a unanimous agreement in principle, based on Quebec's five proposals, which was then released to the public. During May, governments consulted constitutional experts both within and outside the public service on the appropriate legal wording for these principles. The Prime Minister and the premiers met again on June 2 and 3 to agree on a final draft and reached agreement on the text of the constitutional accord which is before the members of this committee.

This accord was made possible by the first ministers' earlier agreement to postpone consideration of other constitutional issues in order to focus attention on Quebec's five conditions. It represents an integrated set of proposals which permit Quebec to play once again its full role within Confederation. It builds on the lengthy period of constitutional discussions which began in the late 1960s and recaptures the opportunity which was lost in 1982 to address the historical concerns of Quebec and its place in the Canadian Confederation.

## 1050

I want to close my remarks today by highlighting the tremendous interest and emotional stake which the Québécois have in the 1987 constitutional accord. This impression has been constantly reinforced in my discussions with Quebecers in my capacity as Ontario's representative to that province. I offer the following observations by way of a report on the accord and its status and impact in Quebec:

First, in the period leading up to Meech Lake, there was a considerable debate between government spokesmen, on the one hand, and Quebec nationalists, on the other, the latter claiming that the five conditions Quebec had put forward for an accord were not strong enough and did not



sufficiently reflect Quebec's traditional claims for distinctiveness or autonomy.

Second, there was scepticism in Quebec a year ago that an agreement could be reached at all, given the history of failure to accommodate Quebec's concerns and the statements that had been made by political leaders of some of the other provinces criticizing aspects of the five points.

Third, the mainstream of Quebec opinion in the last two or three years turned away from constitutional matters to a preoccupation with economic affairs. Nevertheless, a strong feeling of bitterness remained. An impression had been created in Quebec that the 1981 constitutional agreement was an occasion when the rest of the country had excluded and even betrayed Quebec.

Fourth, when it was announced that an agreement had been reached at Meech Lake, the sense of relief in Quebec was palpable. Many opinion leaders supported it because, for the first time, a constitutional arrangement had been found that recognized a distinct place for Quebec within Canada. The opposition party in Quebec criticized the accord for not going far enough and other groups were very sceptical about whether the wording would provide the degree of distinctiveness for Quebec that its proponents have claimed. In fact, the majority of the submissions made to the Quebec National Assembly, which reviewed the Meech Lake accord last May, stated that further guarantees for Quebec were still needed.

Fifth, Quebecers generally assume that a formal deal has been reached by virtue of the signature of the 11 first ministers. The Quebec government has indicated that the current agreement is a package designed to permit Quebec's adherence to and participation in the Constitution and in future constitutional discussions. There is a commitment by the Quebec government to deal seriously with the constitutional concerns of other governments and with other groups in subsequent constitutional rounds following the formal ratification of the 1987 accord.

Let me close my remarks by quoting one Quebecer, Solange Chaput-Rolland, a member of the Pepin-Robarts commission, who said in 1987:

"Inside Quebec, seven years ago, we decided that Canada was our country. We have yet to find out whether our loyalty was well placed. Frankly, in 1982, I wondered if the agonies, the pains, the quarrels, the bitterness following the referendum had been necessary. We voted for Canada; Canada, through its central government

totally absorbed in its will to patriate the British North America Act of 1867, cared very little about those who had openly stated their will to remain linked to this country. Promises and dreams were shattered; not a single Québécois will want to go through such emotions again. You English-speaking Canadians have asked during the years: What does Quebec want? Now you know. It has been described in five proposals not written by constitutionalists, jurists or nationalists, but by men duly elected by 'We the people.'"

I will now return the floor to David Cameron.

**Dr. Cameron:** Thank you. You will have a change of speaker, if not a change of pace.

What I am going to do now is turn to the 1987 constitutional accord itself and address myself to two matters in particular. First, I would like to review the process for the ratification of the 1987 constitutional accord, as set out in the political agreement and the resolution which constitute the preamble to the accord. Second, I would like to identify the origins of the main elements of the accord and describe how each is a response to the historical needs of Quebec and reflects the concerns of the other provinces and the federal government.

The 1987 constitutional accord is composed of three parts, as you know: a political accord, which sets out the undertakings of the federal and provincial governments under the accord; a constitutional resolution, which each government has agreed to place before its Legislature in order to introduce the proposed constitutional amendments, and a schedule of constitutional amendments, which forms the major part of the accord itself.

Under the first, the political accord, the first ministers make a commitment to lay before Parliament and the legislative assemblies, as soon as possible, the resolution calling for amendments to the Constitution of Canada. As you know, the government of Ontario tabled a resolution before the Legislative Assembly on November 25, 1987.

The resolution itself then recites that certain of the specific constitutional changes proposed in the schedule require unanimous federal and provincial support under the amending formula of 1982. The constitutional resolution therefore invokes the unanimity procedure for amending the Constitution under section 41 of the Constitution Act, 1982. For the amendments to take effect, the resolution and the schedule must be passed in identical form by Parliament and the

House of Commons and by the Legislative Assembly of each province.

Of course, each Legislature retains the power to approve or reject the accord or to pass it with amended wording. If this were to occur, if changes were to be proposed by any Legislature and the first ministers were able to agree upon new wording, all resolutions passed prior to that date would have to be passed again with the agreed-upon amendments.

So far, the accord has been passed by the Quebec National Assembly, the Saskatchewan Legislature, the House of Commons and, most recently, the Alberta Legislature. Three of the remaining provincial legislatures will hold public hearings before submitting the accord to a vote. These are the legislative assemblies of Ontario, New Brunswick and Manitoba.

The Senate can reject, fail to pass or alter the schedule of amendments. However, six months after passage by the House of Commons—that is to say, as of April 27, 1988—the House may re-pass the resolution and schedule in its un-amended form, and it will be proclaimed by the Governor General despite the lack of approval by the Senate. So far, the Senate has held hearings in Ottawa and the north, but it has not yet debated the accord.

If Parliament or any of the provinces has not passed the resolution and schedule by June 23, 1990—that is to say, three years from the date of passage by the first assembly, Quebec, the first one to pass the resolution and schedule—then under section 39 of the Constitution Act, 1982, the process expires and the amendments cannot be proclaimed without beginning the whole process anew.

I now will consider the origins of the main clauses of the 1987 constitutional accord and how each responds to the historical needs of Quebec and meets the concerns of the federal government and the provincial governments.

Section 1 of the accord is an interpretation clause which provides that the Constitution of Canada shall be interpreted consistently with two fundamental characteristics of Canada: firstly, the reality of linguistic duality in Canada and, secondly, the fact that Quebec constitutes within Canada a distinct society. The clause also affirms the role of Parliament and all provincial legislatures, including Quebec, to preserve Canada's linguistic duality, and the particular role of the Quebec National Assembly to preserve and promote Quebec's distinctive character.

The recognition of Quebec's distinct character in the Constitution is not entirely new. The

Constitution already protects the distinct nature of Quebec's justice and education systems and the use of the French language in Quebec government institutions and courts. Proposals to recognize explicitly Quebec's distinct society have also been made during the most recent period of constitutional reform. In 1979 the Pepin-Robarts task force on Canadian unity proposed the explicit recognition of Quebec's distinct society as part of the solution to the constitutional impasse of the late 1970s, as did the beige paper, as it was called, of the Quebec Liberal Party in 1980.

The "distinct society" clause, as it has come to be called, is a cornerstone of the 1987 constitutional accord. It gives constitutional recognition to the distinct nature of Quebec, defined by Pepin and Robarts in terms of history, language, law, common origins, aspirations and politics.

However, in recognizing Quebec's distinct character, the first ministers were careful not to diminish the pan-Canadian aspect of linguistic duality, which each government is mandated to preserve. In addition, section 16 confirms that the rights of aboriginal peoples and the multicultural nature of Canada, as recognized in the constitution acts of 1867 and 1982, are not affected by the "distinct society" clause.

Section 2 of the constitutional accord introduces a new process for filling vacancies in the Senate. The new provision gives provinces the right to participate in the appointment process by submitting lists of nominees, from which the federal government will pick a name to submit to the Governor General. This mechanism is, however, intended to be temporary, pending more comprehensive Senate reform.

## 1100

Proposals for Senate reform have been made for a number of years. There is a variety of such proposals based on different appointment mechanisms, powers, and methods of representation. For example, the federal government proposed in Bill C-60, as I think Don Stevenson indicated, to establish a House of the Federation in which half of the senators would be appointed by the provincial governments and half by the federal government. The Ontario advisory committee on Confederation and the Pepin-Robarts commission recommended a House of the Provinces, not unlike the second chamber in West Germany. More recently, the government of Alberta has expressed its support for an "equal, elected and effective" Senate, the so-called triple-E Senate.

Virtually all of these proposals call for a Senate which better fulfils the function of



representing the regions in national government and decision-making. The proposal for a joint nominating process in clause 2 of the Meech Lake accord is an interim measure, while clause 13 specifies that more comprehensive Senate reform will be the first item for the next round of constitutional discussions.

Clause 3 of the 1987 accord would permit the provinces to enter into agreements with the federal government respecting immigration, which is a subject of concurrent federal and provincial jurisdiction. These agreements could then be constitutionally entrenched, but would be subject to the mobility provisions of the Charter of Rights and Freedoms.

Since 1978, Quebec has had an immigration agreement with the federal government known as the Cullen-Couture Agreement. This guides federal immigration policies so as to make them more sensitive to Quebec's historical concerns in this area. Quebec is, of course, concerned about immigration because of its impact on the unique French character of the province and its importance in maintaining Quebec's percentage share of the overall Canadian population.

The Supreme Court of Canada has been another consistent subject of proposals to amend the Canadian Constitution. This is a reflection of the crucial role the court plays both as a final court of appeal and the forum for determining constitutional questions respecting the Charter of Rights and the federal-provincial distribution of powers.

Clauses 4 to 6 of the accord would affirm and entrench the Supreme Court of Canada as the final court of appeal for Canada. They would also guarantee at least three places on the Supreme Court for Quebec justices, in order to ensure that the court is fully competent in Quebec civil law. The latter amendment would constitutionalize the existing requirement for at least three Quebec judges, which is currently found in the present Supreme Court Act. The proposal to provide such a constitutional guarantee was made in both the Victoria charter of 1971 and in the federal Bill C-60 of 1978.

The accord also calls for a new mechanism for the appointment of Supreme Court judges. The mechanism is similar to the one proposed for the appointment of senators; provinces would submit a list of nominees from which the federal government would pick an acceptable candidate. This amendment is intended to ensure that the final arbiters of federal-provincial jurisdictional disputes are appointed after a process of consultation and co-operation between the two levels of

government, rather than unilaterally by the federal government. Again, the proposal to involve the provinces directly in Supreme Court appointments is not new; such a proposal was included in the Victoria charter of 1971.

Clause 7 deals with an aspect of the federal spending power, namely, the power to establish national shared-cost programs in areas of exclusive provincial jurisdiction. This clause would permit provincial governments to opt out of new national shared-cost programs with financial compensation, so long as the province implements a program of its own which is compatible with the national objectives. The clause also provides the first explicit constitutional recognition of the spending power and affirms the federal right to set national objectives in areas of exclusive provincial jurisdiction.

This proposed clarification of the spending power responds to the concern of Quebec and the other provinces that the power distorts the federal-provincial distribution of legislative competence under the Constitution Act, 1867. During the 1968-to-1971 constitutional review process, the federal government itself proposed that use of the spending power in the social policy field be subject to provincial approval.

Clauses 9 to 12 modify the constitutional amending formula in the Constitution Act, 1982. The first change is to require unanimity to amend some matters which formerly fell under the less-stringent general amending formula. These include amendments respecting the House of Commons, the Senate, the Supreme Court of Canada and the establishment of new provinces, all matters which fundamentally affect the nature of the federation.

This change responds in part to one of Quebec's five constitutional concerns, namely, the restoration of its traditional veto, and at the same time preserves the essential principle of equality of provinces which was established in the 1982 amending formula and which was insisted on by a number of provinces. The list of matters for which unanimous approval would be required is limited and the amending formula remains more flexible than in some previous proposals, such as the Fulton-Favreau formula of 1964.

The second change is to broaden the provincial right under the Constitution Act, 1982, to opt out of constitutional amendments which transfer provincial legislative powers to the federal government. However, there is no change to the basic constitutional amending formula which applies to most matters, namely, the approval of

Parliament and two thirds of the legislatures representing 50 per cent of the Canadian population.

Finally, clauses 8 and 13 of the accord enshrine annual first ministers' conferences on the economy and the Constitution. Clause 13 also provides that the constitutional conferences shall address the issues of Senate reform, fisheries and other matters as are agreed upon by the first ministers.

First ministers' conferences have, of course, been a fact of Canadian political life for many years. They are a result of the need in a federal state for an ongoing process of intergovernmental dialogue and action. The entrenchment of first ministers' conferences was proposed in the Victoria charter of 1971. The Constitution Act, 1982, provides for a constitutional conference within 15 years to review the 1982 amending formula. In addition, section 37 of that act, which was added in 1983, provided for a series of conferences on aboriginal issues.

The entrenchment of first ministers' conferences in the Constitution Act, 1987, will ensure that economic issues of national concern are dealt with in a co-operative intergovernmental forum, and that adjustments to our constitutional arrangements are addressed as they from time to time become necessary.

Don Stevenson noted during his presentation that the Meech Lake negotiations were made possible because of an agreement among the first ministers to set aside temporarily other constitutional concerns in order to address the Quebec issue as a first priority. The inclusion of annual constitutional conferences in the accord reflects the commitment of the first ministers to proceed with other questions after the completion of the Quebec round.

As the next order of constitutional business, the first ministers have agreed to discuss Senate reform, as I have said, which is a matter of considerable importance, particularly to western Canadians and the western provincial governments. They have also agreed to address the question of roles and responsibilities in relation to fisheries, which is an issue of concern to Newfoundland. In addition, the annual constitutional conferences will provide a forum for the discussion of other constitutional issues of importance to Canadians.

I began my remarks this morning by looking back at the historical process of adjustment in Canada and the interplay among the forces of Canadian nation-building, duality and regionalism. I suggested that the recent phase of

constitutional reform can be characterized as part of an ongoing search for a balanced expression of these forces, within a broader context of other emerging values and identities which are also increasingly seeking constitutional recognition.

One of the most significant challenges for federalism has been the search for an arrangement which would address the needs of French-speaking Quebecers as a distinctive cultural and linguistic community within Confederation. The current series of constitutional negotiations began in 1967 because Ontario recognized the importance for Canada of finding an acceptable accommodation with Quebec. As indicated by Don Stevenson, the irony of the 1982 constitutional arrangements is that nation-building, regionalism and the pan-Canadian aspect of duality were all addressed in the Constitution, but the initial objective of dealing with Quebec's status was not achieved.

#### 1110

En résumé, l'accord constitutionnel de 1987 a le mérite de répondre au problème de la place accordée au Québec au sein de la fédération. L'assentiment unanime des premiers ministres et la sanction de l'entente par l'Assemblée nationale du Québec constituent des étapes historiques de très grande importance pour le Canada. Elles n'ont été rendues possibles que par la volonté des autres provinces de mettre leurs propres revendications constitutionnelles de côté afin d'accommoder le Québec. L'entente marque donc la fin de l'ère des réformes constitutionnelles préoccupée par la dualité.

Just in summary, the accomplishment of the 1987 constitutional proposals is that they finally address the question of Quebec's place in the federation. The unanimous agreement among the first ministers and the acceptance by the Quebec National Assembly of this package of amendments is an event of signal importance in Canadian history, made possible by the willingness of other provinces to set aside their own constitutional issues in order to get the Quebec government back in.

The accord thus marks the conclusion of the phase of constitutional reform which was preoccupied with duality. But while the Meech Lake accord marks the conclusion of one phase, it is clear, both in the commitments the accord itself makes and in the constitutional discussions that are going on, that it marks the beginning of another, and it seems certain that the interest in constitutional interests which Canadians are demonstrating will continue in the future.



So conclude our remarks. I would like to seek the forgiveness of the committee for the length of this presentation and also for what one of my staff called a fog index of 18 for this submission. As you know, when civil servants appear in public, the main purpose is for them to be as boring as possible. I hope we have not entirely succeeded.

**Mr. Chairman:** Thank you very much. That was certainly a very complete overview of the historical context, and I think it met very well the request that we had made. It was not at all boring but I think was very helpful and useful as we begin our own reflections on the accord.

**Mr. Allen:** Let me say, first of all, that it is with a sense of the great significance and importance of this committee that we launch our first questions to our first presenters. I think it is even with a certain sense of excitement about the role that this committee has been given by the Legislature, and indeed by the Meech-Langevin decisions themselves, that there shall be legislative participation in the process.

I guess this is really the first substantial role the legislative committees have undertaken in constitutional affairs in this country. It looks as though, since this has become a national enterprise—namely, constitution-making, which goes on without end—we will be in this position many times in the future.

I want to say, secondly, that naturally, as representatives from constituencies in Ontario and from Ontario parties, we address the question of the Quebec round of discussions with a sense of the unique significance of that occasion and recognize the importance of the nation-building process that we are in, given the historic relationship that Quebec and Ontario have had, the central and formative roles in constitution-making in the past.

In my first question, I want to ask about the process itself. Perhaps the question is a little bit academic, and yet I think it is important for us to have a sense of the propriety of what we are doing and of its efficacy. We appear to be in an ongoing discussion in which we move from item to item on the constitutional agenda, not having managed to embrace everything in one fell swoop in 1981-82.

From your position of involvement in the debate, I wonder whether you see major problems in that simple fact. We look at aboriginal rights, but at that point in time we are not talking about Quebec, we are not talking about women, we are not talking about regions; and yet there are always implications for all the other elements as we do that. Now we move to the Quebec focus

and we inevitably leave to one side a whole series of other considerations.

From your experience, I wonder whether you have any cautions for us as we enter that kind of constitutional process and whether you think we might perhaps be very reserved in the kinds of judgements we make in each of these stages so that future adjustments might be made in the light of future decisions. In other words, how permanent can decisions so discrete be made in a constitution-making process like this?

**Dr. Cameron:** Whatever one may think personally of it, I think you are correct that it looks as if constitutional discussions will continue to be a fact of life in our society as far into the future as one can see at this juncture. As well, I think your identification of the process the country employs to address those matters is important and needs attention.

I do not have any pat solutions for it, but I think there are clearly areas of that sort that need the concern of a committee such as this and of Canadians generally. My observation, I guess, may surprise you a little bit when you talk about the seriatim approach to constitutional reform. One of the things I perceived really causing problems, one of the reasons there was a blockage during the 1970s and early 1980s, it seemed to me, was that in the discussion, which began initially focusing on Quebec and started out in the late 1960s, more and more people got a taste for constitutional issues and more and more constituencies and especially other governments began to think: "Don't we have an interest that has a constitutional expression? If so, why is that not on the table along with the concerns of Quebec?"

As you went through the 1970s, what happened was that more and more people climbed on board the constitutional bandwagon and you reached a point where a settlement had to be bigger and bigger and bigger because there were more interested participants in it. It was very difficult at that stage to get people to agree that we would start with the Quebec reality and address that and then turn to other matters.

I think that was a major factor behind the difficulty the country had in reaching a constitutional settlement in the 1970s and early 1980s. One of the interesting features of this process, and we draw attention to it in our remarks, is the explicit agreement and undertaking on the part of the nine provincial premiers and the federal government to say, "This is essentially the Quebec round and that is really its essential

character, which is not to say we will not get back to other things."

There are advantages in a *seriatim* approach to constitutional reform, I think, particularly if we can fashion for ourselves a process that allows all the interested participants to have their voice. That is perhaps the way in which you can ensure that the impact of the given reform proposed is what you intend and not something you do not intend.

In this round and the 1982 round I thought: "Thank God, we are now able to start dealing with it on a normal basis. If we have a problem, let's fix it. If we do not have a problem, let's leave it alone." Those would be my initial comments on it.

**Mr. Stevenson:** I wonder if I could add just an extra thought or two. It is very interesting to see how we are moving into a totally new phase. There was quite a feeling from the 1960s that we should be starting from scratch, so a number of the reports I have referred to here really are an attempt to provide the framework for a new global Constitution.

What 1982 and 1987, completing the 1982 round really, do is to give a base on which you can now add each year. The Meech Lake accord provides for a constitutional conference every year. It may be just for five minutes if there is nothing on the agenda, but it provides a totally new opportunity for groups to deal with single potential amendments.

## 1120

The other thing that bedevilled all governments in the 1960s and 1970s was the assumption that you could not change without unanimity. One of the great advantages of the 1982 constitutional accord, carried on for the major part into the Meech Lake accord, is that the general amending formula is just seven provinces plus 50 per cent. That will make amendments *seriatim* easier in the future.

I think there is also an assumption that there will be less constitution-making solely through the process of executive federalism, behind closed doors of government representatives. The Charter of Rights has given a new interest for all sorts of groups in the impact of the Constitution, which will find their way directly to legislatures at all levels of government.

I think this series of hearings you are going to have will be enormously valuable in the development of that ongoing series of constitutional meetings that is being proposed. There is no question that there are a lot of issues that impact on other groups which have not been touched by

this round but which will need to be addressed as the new conferences are held each year.

**Mr. Chairman:** I wonder if I might follow up on that point. In the Robarts Confederation of Tomorrow Conference and, as you say, in the first phase from 1968 to 1971, there was an attempt to try to deal with a pretty broad range of subjects. If I recall, in certain areas different working groups were set up, progress was made in some areas, but it was always difficult to move on one front.

To what extent would you say that the Pepin-Robarts exercise and that report were in a sense, if you like, the parents of Meech Lake? At the time, that report did not receive, if I recall, a great deal of support, yet it raised a number of issues which there were difficulties in dealing with in the 1981-82 period and which have come back. You touched on that in the document, but I wonder if you could expand a bit on that particular report and its relationship to what we are looking at today.

**Mr. Stevenson:** Dr. Cameron says he refers that one to me, although when it comes down to the details of Pepin-Robarts, he is the expert. My own sense is that the Pepin-Robarts document is very important philosophically as a base for this particular round. The 1982 agenda was essentially that of the federal government of the day, with the Bill of Rights as the centrepiece, and the amending formula obviously was something that all the governments, particularly the English-speaking provinces in Canada, were concerned with.

I see a parallel trend with the Ontario Advisory Committee on Confederation, for example, which started using some of the same philosophical bases as the Pepin-Robarts commission. There was a great deal of similarity too in the beige paper of the Quebec Liberal Party, which again found some of its recommendations directly in the Quebec propositions of 1987. I think if you look at those four documents, you will find a great deal of similarity. So there is very much a historical forerunner.

The attempt by the Quebec government to set out the five conditions was something that was to pick the five areas the Quebec government felt would be easiest of accommodation by the rest of the country but which also touched some traditional Quebec and Canadian concerns as represented by those earlier reports. What it does not do is touch the long list of distribution-of-powers exercises, which we went through in the 1960s, 1970s and early 1980s. However, we now at least have an amending formula that permits



for more flexibility on distribution-of-powers issues than was the case in the 1960s and 1970s.

**Mr. Breaugh:** I just wanted to get one beginning concept put together. We have all had a chance to kind of ruminate a bit now on the wording of the accord and there are some different words used. But I am really searching to find some new ideas in there. It seems to me that almost everything is something that has been discussed at one time or another previously—has been the practice, if not exactly the prescribed form. The only new thing that I can find in here is, in fact, the process.

I think, as most lay observers would say, it is a strange one indeed that has been used to date—that the Constitution of a country would be decided in private, behind closed doors, and then formalized at a subsequent period and that now, across the country, there are legislative committees that are forbidden by the premiers to move amendments but are urged to hold public hearings.

The only thing I see that is new, and I would like to get your reaction to it, is that process. It appears to me that the opportunity is here, now, to rectify what seems to most Canadians to be a very screwy process. That is, that if there is now an opportunity to hold public hearings, identify needs, identify ways in which you might resolve those needs, these legislative committees would be in a position to say: "OK. If you can't change this agreement, here is the priority for the next first ministers' conference. Here are some ideas that may be tried among the provinces and the federal government as to how to proceed."

That process is really the only thing new that I can identify in the accord. I would like to get your response to that.

**Dr. Cameron:** Just to respond on the process issues that you have raised, I think if you look at our history and the role of the Constitution in the past, its basic purpose was really to sort out the relationships in a federal state between the two orders of government and establish some kinds of mechanisms that will allow federalism to be conducted.

The logical manifestation of that in Canada has been executive federalism—or the executives, the first ministers and ministers, working together to reach some kind of an accommodation on a particular issue.

I think we are in, and have been for the past 20 years, a very substantial process of change. It is reflected in the Constitution, as it is reflected in other areas. I think the referendum in Quebec, setting aside the specific issue, was itself a

mechanism that was, in our generation, fresh and new. It was a direct consultation with the people. That is not something Canadians have gone for substantially.

So it, in its own way, I think also reflects this change, which is that the society is much more participatory and much better organized. Individuals and groups are better organized to represent their concerns. The Constitution itself increasingly is reflecting values and rights of individuals and rights of communities, not simply the powers of governments.

I see all of this cohering and pushing us in a direction. We are already embarked on this path where, increasingly, concerned Canadians have got to have a voice, and clearly the legislative branch of the government is extraordinarily important in giving tongue to those concerns, as one discusses the Constitution or any other significant issues.

So, again, without knowing exactly where that will take us as a nation, I think that is the course we are embarked upon. I think a lot of scrutiny needs to be given as to how one can best do that.

I think the other point I would make is that we have tended historically to look at each constitutional initiative or attempt to reach a conclusion as an act. We will do it and then, having raked the leaves for the fall, we can go away and we do not have to worry about it again.

I think now we are recognizing that it is not going to be over. I am not sure it is the healthiest thing in the world to spend your time talking about constitutions all the time. On the other hand, it does sort of leach out some of the unnecessary significance of any particular event or occasion, because it is part of a longer-term process and people will be returning to the table and discussions will prevail.

I guess that is the way I see 1982, which is now followed by 1987. In between that there was an amendment relating to aboriginal arrangements. What I see beyond 1987 is an ongoing process. I think the issue you raise is a very important one.

**1130**

**Mr. Stevenson:** Perhaps I might add another element too. I suppose the problems about 1982 and 1987, from the point of view of MPPs, are that because they involved quite a few different elements, they became a delicately negotiated balancing act that became very difficult to change. However, I think in future, because we will not likely be moving on such a global manner, there is an infinite range now of possibilities as to how constitutional amendments can be achieved.

One way, which we have seen in the United States, is to have an amendment resolution passed in a single Legislature and then lobbying may take place by particular interested groups on other Legislatures, until you arrive at that magic figure of seven provinces plus the federal government on a particular amendment requiring that amending formula. That has not really been done in Canada, but it is very much a possibility with the 1982 amending formula.

I think if you get into big, global amendment packages, you cannot avoid the kind of late-night executive federalism bargaining sessions; but on single-issue amendments, I think this is very different, or one or two or three. I see a much greater role there for Legislatures, singly and collectively.

**Mr. Harris:** How do you answer the charge that the other provinces outside of Quebec accommodated the veto request by insisting, "That is fine; we all want one too"? Is that your assessment of what happened? That charge has been levied. I think it would be difficult not to suspect that there was some of that among some of the provinces.

**Dr. Cameron:** I go back to the comment I made earlier about more and more governments and organizations getting interested in the Constitution and recognizing that it is significant for their lives and fortunes. Consistent with that, there was a growing concern on the part of a number of provinces during the 1970s and into the 1980s about the status of the provinces' and provincial governments' desire to have in some fashion entrenched or understood that provinces are equal. In that framework, concern to give Quebec a veto over amendments to the Constitution was to confront that issue directly.

If this is the thrust of your question, I agree that what one had, on the one hand, was a deep concern on the part of Quebec that it had lost control, it had lost some capacity that it was understood to have had in the past that was summed up in the traditional assumption of its veto. You had that, on the one hand, and you had several other provinces finding it very difficult to entertain the proposition that this would be given to Quebec. I think the amending formula that was worked out was a way of trying to bring those two points of view together. It involves something of an expansion of the unanimity principle over certain critical areas. That gives Quebec its veto, but it gives everybody else a veto over it as well.

**Mr. Harris:** So you would suspect that the main impetus to move in that direction was a fear or a concern that they could not sell back home in

Ontario or in British Columbia or in Alberta that Quebec has a veto but we do not; that would be unsaleable back home.

**Dr. Cameron:** That I do not know.

**Mr. Harris:** I sensed that is what you said as to why they went that way.

**Dr. Cameron:** For a good period of time on constitutional issues, I think a number of provincial governments were leading, not following, public opinion in their province, and sometimes raising issues that were a concern to them as governments that probably did not have a very sharp echo in the provincial population itself. I think it is a mix of factors.

**Mr. Harris:** Was that Ontario's position?

**Dr. Cameron:** I am sorry: on the veto question?

**Mr. Harris:** Yes.

**Dr. Cameron:** In this case, I am perhaps in the happy position of not having been part of the government at that stage. I came in the fall, in October.

**Mr. Stevenson:** Perhaps to put that one into a bit of historical context, most amending formulae that were put before governments up until the mid-1970s involved some combination of numbers of provinces plus a proportion of population, and almost all of these formulae that were put out in earlier global constitutional documents gave Ontario either a veto or something close to it because of the fact Ontario always had about 35 per cent of the population.

Thus the Victoria formula, which seemed to be the closest to acceptance and which was very close to formulae put forward in the 1920s and 1930s when we were first trying to patriate the Constitution, involved any province that had ever had 25 per cent of the population, which automatically included Ontario and Quebec, for a veto, plus two of the four Atlantic provinces, plus two of the four western provinces containing in total at least 50 per cent of the western population. It could have been Alberta and British Columbia, or Alberta or BC and Manitoba and Saskatchewan.

As I think I said in my remarks, the Alberta government in 1975 rejected that element. BC at about the same time said: "We consider BC a separate region. We do not want to be lumped in with the west." This was picked up by some of the smaller provinces, to the extent that by the time we got to the 1981-82 agreement many of the smaller provinces, I think led by Alberta, felt that their great gain in the 1981-82 constitutional exercise was the principle that all provinces are



equal in terms of an amending formula—seven provinces; it did not matter what, although the 50 per cent of the population obviously would favour provinces with larger populations, and there was no veto in that for either Ontario or Quebec. This was the great criticism Mr. Bourassa put on the Lévesque government, that it gave up the Quebec veto even though it gained back the opting-out provision.

We were not able—I think any government in the last five years—to contemplate the old type of regionally based formula. We were in a situation where Quebec, as one of its five points, was concerned to have a veto at least over national institutions. One could consider the equivalent of a veto on distribution-of-powers issues being the power to opt out of amendments that would transfer power to the federal government for compensation, which gives in effect a veto.

That was not accepted for Quebec alone by the other provinces, as being a derogation from their victory in 1981-82; so that very few, a limited number, of national institution issues went to the unanimity—

**Mr. Harris:** I understand the history. I am sorry to interrupt, but was it Ontario's position that it would be advantageous for all provinces to have a veto? Was that the consensus of the provinces? Or was the motivating factor that Quebec had to have that, so we had to have it? That is all my question is.

**Mr. Stevenson:** For Ontario, I think we have always as a province, over the 1960s and 1970s, been prepared to live with almost any number of amending formulae; and there was probably some bias by the Ontario government in favour of formulae that were more flexible as opposed to closer to unanimity. It was largely pressure from other provinces that led to the type of formula we now have, and particularly to the every-province-is-equal exercise from 1981-82, as Dr. Cameron has mentioned.

**Mr. Harris:** I do not want to take all the time and perhaps I can come back, but in the same vein, there are a number of people who have criticized the accord. I do not want you to pick apart my generalization as being too simplistic. I think the gist of the criticism has been, "Mulroney promised this and he has to come to a deal, so he will give away anything in order to get this deal." There are a number of people who have criticized the reaction of the provinces in that the other provinces, outside of Quebec, are saying: "He is going to sit us down here until he gets a deal. He is prepared to give away anything and everything to get this deal. Let us get whatever

we can." Was that your sense? How do you answer that criticism?

1140

**Dr. Cameron:** My response would be, first, I can speculate as an individual, but I do not know about the motivations of the Prime Minister on this score.

I think the central issue is assessing product. Is the product deficient, and radically deficient, with respect to that kind of concern? In other words, does the Meech Lake accord not attend to the national interest and the capacity of the national government to act on behalf of all Canadians? Has it really undermined the constitutional balance between the national government and the provincial governments? I think that is the critical question in trying to come to terms with the issue you are touching on.

**Mr. Harris:** I am trying to understand because, in the future, in order to change any significant parts of the Constitution, there must be unanimity, and there is a lot of suspicion that you are going to have to buy unanimity. I am trying to ascertain at what price unanimity was bought at this conference, because that is probably what is going to happen. You were not there, so I do not know whether Mr. Stevenson wants to comment.

**Dr. Cameron:** I think the unanimity clearly is a more demanding amending formula than the general amending formula. On the other hand, the involvement of Quebec at the constitutional table in the future, which has not been the case in the past, is a potential for reform and change that was not there before. I think some people look back at the aboriginal discussions and say, "Had we had Meech beforehand, it might have been a good deal easier to have approached an accommodation with the aboriginal community."

I think the rigidity of the unanimity formula, compared to the other one, is evident.

**Mr. Chairman:** Could you just clarify there again—because this is, I am sure, going to come up on several occasions—the change in the formula of what it now covers and what it does not cover? In other words, what does the 1982 formula continue to cover? I think at times we are going to get confused in different formulae.

**Mr. Stevenson:** I would point out to Mr. Harris that I think the bulk of proposed amendments in the future will not refer to clauses that require unanimity. They are basically areas that refer to our national institutions, the territories, the distribution of powers, all of those that fall

under the general amending formula of seven plus 50.

Section 41 of the Constitution Act, 1982, did provide unanimity for amendments relating to:

“(a) the office of the Queen, the Governor General and the Lieutenant Government of a province;

“(b) the right of a province to a number of members in the House of Commons not less than the number of senators by which the province is entitled to be represented at the time this part comes into force;

“(c) subject to section 43, the use of the English or the French language;

“(d) the composition of the Supreme Court of Canada; and

“(e) an amendment to this part.”

What was added by the Meech Lake accord to that unanimity section were the principle of proportional representation of the provinces in the House of Commons, the powers of the Senate and the method of selecting senators, the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators, the other elements of the Supreme Court of Canada, the extension of existing provinces into the territories and the establishment of new provinces.

Essentially, it is a question of national institutions and the basic structure of the federal-provincial makeup of the country. But if one looks at potential amendments in the future, obviously the Senate will fall under that, and the question of potential new provinces. For the rest, they would be likely under the seven and 50 clause.

**Mr. Chairman:** Mr. Cordiano.

**Mr. Allen:** Mr. Chairman, are we shifting to another question? I would like a little supplementary on this one.

**Mr. Cordiano:** Go ahead.

**Mr. Allen:** Just a very brief one. In 1982, for some reason, the list covered by unanimity did not include those latter items. Now, in 1987-88, the proposal is to include them. Why were they left out in the first place? They are national institutions and pertain thereto. Why were they included the second time around and at whose insistence?

**Mr. Stevenson:** In the first instance, I think governments were trying to keep that list as restricted as possible, knowing that unanimity does provide real rigidity in getting achievement. I think the second time around there was an attempt, first, to deal with the Quebec desire to

ensure that you could not have the basic institutions of the national government changed without Quebec's approval, so you had the Quebec veto requirement. Then, as we were saying just a little while ago, you had the every-province-is-equal argument put up against the Quebec veto, resulting in unanimity.

There was also, though, I think, an increasing belief that, with the new processes that are being arrived at, unanimity would not be such a barrier as it had been seen to be in the past. Previous constitutional exercises had failed in the past 20 years largely because they involved so many different pieces. With the potential now for proceeding one by one, you could prepare the groundwork for unanimous agreement on these things that do affect all provinces, the national institutions, and unanimity therefore was not unreasonable. Many other federations require unanimous agreement before you can change the basic institutions of the federal state.

**Mr. Cordiano:** I just want to go back to this notion of the process that is involved in constitutional reform. Of course, your brief is very thorough and certainly looks back some distance in our history. But looking back, as we as a nation have conducted this process of constitutional reform we have always had first ministers meeting to determine changes. Perhaps you can shed some light on that.

Going back to the days of Confederation, the Fathers of Confederation meeting in Charlottetown: how has that been conducted? Has it been conducted in any other way? Have we not followed history on that in the last 20 years with the institution of first ministers' conferences?

**Mr. Cameron:** I think it has been a long-standing practice in Canada that the executives in the governments of Canada would work out together arrangements where they had relationships and involvements that had to be sorted out. If you go far enough back, the necessity of ongoing, intimate, continuing reconciliation of positions and policies in a federal state was simply much, much less. You did not have to have that much contact with the other governments because you did not have that much need to do it.

As well, I think when you go further and further back, the working assumption of people was that the governments took the responsibility to act, one hoped, on behalf of the people, and you let them get on with it. There have been a number of forces at work that have pushed us quite sharply in another direction. One is simply the modernization of society where governments



are increasingly involved in many areas of life, so they have got to work a lot more closely together, and executive federalism has flourished in that environment.

A counterweight, which I think will grow increasingly important, is an increase in democratization. People are more and more interested in involvement in the public sector, involvement in government and controlling government through means that go beyond simply voting the leadership of the country or the province in and out at those times.

**1150**

**Mr. Cordiano:** Certainly there were some precedents for federal governments to meet with provincial governments, and that involved both jurisdictions. Those were hammered out over a series of meetings in the course of history in this country and some significant things came out of that: federal spending in areas of provincial jurisdiction or vice versa, revenue-sharing, etc. That has been the history of federal-provincial relations in this country. The two governments did sit down and discuss changes in the way they were doing things and that led to constitutional discussions over the years as well. That was my only point.

I also want to get back to this notion of an evolving process of constitutional reform and the involvement of society, a more integral role for people wanting to make changes to society. You could say that of course the charter has had a tremendous impact on that process. Because of the charter, you will now have greater interest on the part of citizens to make their points of view felt right across the country and to bring about reforms that were virtually impossible to do any other way than by the legislative process in the past. That is the sort of thing we are facing now, where the charter is going to have even more impact than the recent impact it has had.

**Dr. Cameron:** I think there were at least two streams of thought at the time the charter was seriously being considered and ultimately accepted and implemented. One was clearly that it was a good thing to do from the point of view of the rights and liberties of the citizens of this country, but another dimension which was part of the politics of the times was that the charter was, in our vocabulary, a nation-building provision or act because it meant that Canadians held rights, as Canadians, nationally, and therefore the claims with respect to those and the movements for change would be referred to the Supreme Court and the national Parliament as well as provincial legislatures.

It was a nation-building act in the sense that it really was a common charter for Canadians, wherever they were in the country. I think both of those dimensions can be seen in the course of the life of the charter since it was instituted.

**Mr. Cordiano:** Giving expression to that, and certainly with regard to the charter's role in bringing about an evolutionary process in constitutional reform, then of course we have the institutionalization of first ministers' conferences on the Constitution, and those two things will certainly allow for changes to be made in the future at those constitutional meetings.

Getting back to the fundamental question of the charter and this new accord, we are going to be dealing with this in the days ahead in more detail, but in your general opinion, with respect to the charter—this is a question that is going to be raised over and over again, I am sure, and perhaps it is best addressed by legal experts; I do not want to put you on a footing that you probably may not wish to answer, but I am going to put it to you anyway—do you think Meech Lake will have a negative impact on the charter and what it means to constitutional reform in terms of the evolutionary process unfolding? Will it have a dampening effect? That is what I am trying to get at.

**Dr. Cameron:** I think you are correct that you will be hearing from a range of constitutional experts, who will not all perhaps be singing from the same song book, but a personal sense of it is—

**Mr. Cordiano:** That is what I want, basically.

**Dr. Cameron:** First of all, I think the popular commitment to the charter is very, very strong and substantial, and I think the behaviour of the courts to date has been to treat the charter seriously and to treat the role of the courts in protecting the provisions of the charter very seriously. So, where there is a choice between a loose-jointed, reserved or modest interpretation and a more energetic, vigorous interpretation, it seems to me the court is tending more in that direction. Although you should put that question to people who really know what they are talking about on that score, I think those are two very important phenomena in assessing this.

My sense is that the provisions of the Meech Lake accord vis-à-vis the charter, as understood in that sense, will not cripple or undermine its capacity to function as a very powerful charter document for Canadians.

**1200**

**Mr. Stevenson:** If I could just perhaps back that one up. There was very much a sense by all

governments, when the charter was first put in, in 1982, that it would take a few years to work out through various judicial decisions the balance between the guarantees in the charter and the potential modifying clauses: section 1, which gives governments a potential for detracting a little bit from the absolute guarantee, or section 33, which is the "notwithstanding" clause.

There is an agreement that the adequacy of the charter's protections would be addressed as a more global issue after one had had a few years of experience. Those provisions, certainly section 33, were an absolute condition of the charter's acceptance by those governments which had opposed the charter in the first place.

If you go back to the period prior to 1982, the majority of the provincial governments of this country, not including Ontario, were very much against the idea of a charter at all. The only reason they supported it was because they had the potential of the non-derogation clause and a clause at the outset, in section 1, that would permit a legislature potentially to override.

Those to me are the major issues that will have to be looked at in the future, about the adequacy of the charter's protections. In that light, I would think the Meech Lake provisions are very much incidental; there is not that much of a direct potential conflict between Meech Lake and the charter at all.

**Mr. Chairman:** I am mindful—

**Mr. Harris:** Can I just follow up on that? Then you can strike me off the list.

The part of Meech that strikes me as impacting the charter is the selection process for judges. I am not a lawyer and not an expert on our justice system, but it appears to me we are now becoming far more like the US system in that we are going to have judges interpreting—as we just saw with the abortion act—not just the law, as they have in the past in Canada, but now interpreting the charter and putting more of their interpretation on it.

There have been some who have suggested far more looking into the background of judges; as goes on in the US where they look at, "How does this man think?" through the Senate hearings when they suggest they are going to confirm or reject a presidential appointment.

When you say there is very little impact of Meech Lake on the charter, I suggest to you there is a dramatic and significant impact. I wonder how much discussion went into how judges are now going to be selected as Supreme Court justices in Canada. Was that a significant part of it or was it just a case of saying, "Quebec wants

three; let's just go ahead and give it three and get that on the record"? Was there any discussion of the rest of the process?

**Mr. Stevenson:** I should say that the three for Quebec has been a practice—it is in the Supreme Court Act—for years.

**Mr. Harris:** I am not as concerned, you understand, about that as I am about the whole process and about what we are going to see in the future with the charter; whether that was looked at, in fact, or if not, was it just looked at as, "Let's entrench Quebec's three and move on."

**Mr. Stevenson:** I quite understand. I think if you go back, and some of this is brought up particularly in David's history of that section, there have been proposals for different ways of appointing Supreme Court justices since this whole exercise of this phase began in the 1960s. One of the things that really brought it to—

**Mr. Harris:** But having the charter in place makes quite a difference, does it not?

**Mr. Stevenson:** Exactly. The other thing, though, was that the Supreme Court is, after all, the constitutional court of Canada which adjudicates between federal and provincial governments. Canada is almost unique in having the referee, in a sense, appointed by one side of potential arguments. So most constitutional proposals of the past 20 years involved some element of federal and provincial input into the choice of Supreme Court justices.

## 1200

The particular one that was adopted in Meech Lake was one that had been on the table from time to time, although more commonly you had a situation where both governments consulted and then you had some tie-breaking mechanism in case of disagreement. You will find various opinions on what the impact of this provision will be. Neither of us is in the legal profession. I think you might well want to ask a number of the subsequent witnesses how they think that will act.

**Dr. Cameron:** The only point I would make is that the change in the nominating process adds a voice for provincial governments in the naming of Supreme Court judges to that of the federal government. I think it is an interesting question you have raised, but it is not clear to me how that relates to the charter and the interpretation of the charter, which is what I take to be the concern you have raised.

It is clear that it is a confirmation of the role of governments in establishing the supreme court of the land. If it relates to anything with respect to



governments, it is the point that Mr. Stevenson made, which is that it is an arbiter of federal-provincial conflict and an arbiter of the Constitution as it relates to powers of governments. So it is logical, if you like, in that sense, that both would have a voice.

But all of that is distinguishable from the question of the charter, which is regulating the relationships between governments and individuals and among individuals. It has a certain character in that sense, but as to its impact on the nature of the role of the Supreme Court vis-à-vis the charter, I do not know how it will have an effect. I literally cannot surmise how it would have an effect.

**Mr. Chairman:** I am mindful of the time, and there are a few more questioners, so I just ask that we be somewhat brief. I have five, in this order: Mr. McLean, Mr. Breaugh, Miss Roberts, Mr. Allen and Mr. Offer.

**Mr. McLean:** My questions will be very brief. I have two of them. On page 21 of your brief, you indicate the protection for the two official languages and minority-language education rights. Can you explain to me how and in what way you are going to protect minority-language education rights?

**Mr. Stevenson:** Page 21 basically refers to the 1982 constitutional provisions, which are already the law of the land. That in turn relates basically to section 23 of the Constitution as adopted in 1982, which came into effect in April 1982.

This provides that, "Citizens...whose first language learned and still understood is...English or French...or who have received their primary school education in Canada in English or French...have the right to have their children receive primary and secondary school instruction in that language in that province."

Or, "Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French...have the right to have all their children receive primary and secondary school instruction in the same language."

Finally, "The right of citizens of Canada" in those previous sections "to have their children receive primary and secondary school instruction in the language of the English or French minority...applies wherever...the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and includes," wherever the numbers warrant, "the right to have them receive that instruction in

minority language educational facilities provided out of public funds."

So it is that provision which was referred to on page 22 and which has been in effect now for the past seven years.

**Mr. McLean:** Basically referring to the two official languages?

**Mr. Stevenson:** Yes.

**Mr. McLean:** Thank you. The other question I have is on page 35. It says, "In addition, clause 16 confirms that the rights of the aboriginal peoples and the multicultural nature of Canada, as recognized in the Constitution Acts of 1867 and 1982, are not affected by the 'distinct society' clause."

What you are saying is that you are looking to make Quebec a distinct society and to leave out the aboriginal people in that distinct society?

**Dr. Cameron:** It is saying that none of the provisions in that interpretation clause, respecting the distinct society and respecting English-French duality, will affect the provisions in both the 1867 act and the 1982 act with respect to either native peoples and aboriginal rights or the multicultural provision in the 1982 act. It is specifying that it will not have an effect, that this provision will not affect these other provisions of the Constitution.

**Mr. McLean:** It will not affect the aboriginal people, either.

**Dr. Cameron:** Correct.

**Mr. Stevenson:** You will undoubtedly get testimony from other witnesses as to whether that clause was actually needed or whether it was basically a sense of safeguard against groups who felt they might be affected.

**Mr. McLean:** Why were the aboriginal peoples' rights left out?

**Dr. Cameron:** They are covered by two of the references in clause 16, so it is both aboriginal peoples and multicultural groups. Did I understand your question correctly?

**Mr. McLean:** I believe you did. I am not sure. What I want to know—

**Mr. Stevenson:** The basic question of aboriginal rights was dealt with both in the 1982 Constitution and in the amendments that came in in 1983-84. In the Quebec round, there was no special provision for aboriginal rights except for that clause; you might say a non-derogation clause or whatever.

**Mr. McLean:** There were no special rights in the Constitution at all for the aboriginal people.

**Mr. Stevenson:** Yes. In 1982 and 1983, there was a series of about four or five amendments relating to aboriginal rights. What was not achieved in the period from 1982 to 1987 was a constitutional right to aboriginal self-government, which we came very close to. If Quebec comes in with the passage of the Meech Lake resolution, I am sure that will be very quickly back on the agenda, because there is a sense that this is unfinished business.

**Mr. Chairman:** That is certainly an issue that is going to come up before this committee.

**Miss Roberts:** I will be very brief. Perhaps, Mr. Stevenson, you can help me with respect to this. You indicate that this is the Quebec round and it is the culmination of the attempt to define Quebec's place in Confederation. Also in your brief, you have indicated there are still many concerns in Quebec itself.

Do you feel from your own sense of feeling of history that we will be relooking at any of the various clauses that were set out here in the Meech Lake accord? Are we going to be relooking at this some time in the future? Are we going to be sharpening these some time in the future?

**Mr. Stevenson:** It is difficult to look at the future. I must say personally I feel quite a sense of accomplishment, that after having been involved since the early 1960s in trying to get a constitutional accommodation that does involve Quebec, we have finally done it. This is a fairly limited list of issues that have been put forward by Quebec over the years. I can quite see in future constitutional conferences others from the historic package coming back. But the current Quebec climate is such that the Constitution is not on the top of the public priority list. I think it would be if there were a sense that this were being rejected. Then I think we would see it very quickly.

I think, the Meech Lake accord gives a comfort level for general public pressures and opinions in Quebec for the time being, but there is a nationalist in the heart of every Quebecer. Depending on pressures at any time in the future, there may be pressures for other amendments.

Obviously, there will be pressures for amendments from other groups and other parts of the country over the next few years. Now we would have a process where we can deal singly with them and annually, if necessary.

1210

**Miss Roberts:** Quebec is now going to deal with the Charter of Rights in its legislation,

notwithstanding the charter. The charter will be dealt with in its courts.

**Mr. Stevenson:** Yes. This was one of the policy proclamations of the Liberal government when it came in, that it would no longer do what the previous government had done, take blanket use of the "notwithstanding" clause to exempt Quebec legislation from the charter. That is no longer happening.

**Mr. Allen:** Before I put my question, I wanted to note a couple of items. You did refer again to the use by Quebec of the "notwithstanding" clause. I think one would want at least to note in passing that Quebec itself has a very ambitious and comprehensive bill of rights and freedoms which governs Quebec legislation. That is important to say when one makes a statement like that, I think.

Second, I noted, and I do not know whether it was a deliberate omission, that when you reviewed the changing identities and character of the nation, you did not anywhere use the word "multiculturalism." I do not know whether that was a deliberate oversight or not.

There was a reference to the Pepin-Robarts proposal with regard to a distinct society, actually pinning down the characteristics of a distinct society in terms of distinctiveness of history, language, law, origins, aspirations and politics. Yet all that kind of description of what was meant by "distinct society" was not included in the Meech Lake statement. That has given rise to a lot of debate as to what was being referred to in terms of "distinct society."

Can you tell us what Ontario, in its participation in this discussion and in its agreement with that language, understood "distinct society" to mean?

**Dr. Cameron:** With respect to your first point, I am stung by this. I hope we have not neglected this. We made two points. One is that when we talk about nation-building, it is the framework of a very diverse society which comprehends multiculturalism. But on page 3 we were talking about the post-war change and about the large numbers of immigrants who have chosen Canada, making it pluralistic and dynamic, and we were really getting at the phenomenon there, or intending to do so.

**Mr. Breagh:** If the fog level had been 11 instead of 18, some of us might have understood that.

**Dr. Cameron:** This is where we should have been clear instead of obscure.



**Mr. Breagh:** You should have picked one of our official languages.

**Dr. Cameron:** That is right. Don may want to comment further on the second question, but I think one of the reasons people did not get into a definition of what "distinct society" meant is addressed exactly in your question, just how difficult it is to get it right when you are trying substantively to describe the features of something as dynamic and as supple and as changing as a society. There may be some advantage in leaving that a more open category, recognizing that language is a centrepiece in the process, but there are historical conditions and legal arrangements.

**Mr. Stevenson:** I might refer you to the report of the parliamentary committee on this question, because it does go through that question quite well on why the definition was not expanded. For instance, it mentions that if you had tried to define the distinct society constitutionally 20 years before, you would have had a very different perspective on what made Quebec different from the rest of the provinces. You would probably bring religion in at that point, which you did not, and nobody thought you would, a year or so ago.

This is obviously something that will work out over time, but it must be remembered that this is just an interpretative clause; so it will be brought in only when there is a potential conflict in substantive clauses. But it does again provide a measure of symbolic comfort to Quebecers that for the first time there is the constitutional recognition that Quebec is considered to be distinct within Canada.

**Mr. Offer:** I do not think it is being overly simplistic, but it seems to me there are two major areas. One is constitutional reform, and there we hear comments and concerns as to what it means and the implications of the sections. The second is the constitutional reform process. I would like to deal a little bit with the process, given that your submission has gone through the process as it

was, what has led up to what we are here for today.

With respect to the process as you see it evolving, not what has gone on in the past, and in particular the constitutionalization of the first ministers' conference, do you see this as an improvement, a first step in the evolution of the constitutional reform process? I would like to get your feeling on that.

**Dr. Cameron:** I think the first ministers' conference is an institution that will be with us for many years to come. It has performed and will continue to perform a significant role in the working out of federal-provincial relations and national problems of many kinds.

My own view is that, to that have to be supplemented, or into that have to be integrated, much more explicitly the opportunities and capacity for society more generally—not organized and represented by first ministers or by ministers but organized and represented in a variety of forms—to have a voice, to express priorities and to have an impact on the ongoing process.

No doubt that is excessively general, but it is where I am going to stop, because I do not have an answer on the question of precisely what mechanisms would be appropriate. I suspect the government, as well as this committee, will be giving thought to those sorts of issues as we move through this stage and on into the next one.

**Mr. Chairman:** I think that is a good point to end our discussions, with that sense of something that is to come and undoubtedly something that the committee will be addressing.

If I may, on behalf of the committee, Dr. Cameron and Mr. Stevenson, thank you both not only for your paper, which has certainly given us a great deal to reflect upon, but also your answers to our questions. I think that has given us a good starting-off. Many thanks.

The committee recessed at 12:17 p.m.

## AFTERNOON SITTING

The committee resumed at 2:06 p.m. in room 151.

**Mr. Chairman:** Ladies and gentlemen, I think we can begin this afternoon's session. I want to welcome Professor Peter Hogg of York University's Osgoode Hall Law School. It is a pleasure to have you with us this afternoon. We have briefly discussed, prior to the meeting, how we might proceed. If you could just set that out and begin, we will start the afternoon session.

DR. PETER HOGG

**Dr. Hogg:** Mr. Chairman, as you know, I have published a little annotation of the Meech Lake constitutional accord. In effect, I am going to use that as my notes for today's presentation.

**Mr. Chairman:** I should mention that we have provided each of the members with a copy of appendices 2 and 3 so that you may make reference to that and we can follow along.

**Dr. Hogg:** There are two other bibliographic sources of which the committee is probably aware, but let me mention them just in case you are not. First, there was a conference at the University of Toronto in October 1987, solely on Meech Lake. The proceedings of that conference are being published under the editorship of Carol Rogerson and Kathy Swinton, two professors at the University of Toronto. I think you will find that is a useful source of material on Meech Lake.

The second source, which of course you know about, but let me mention it because it is particularly useful, is the report of the federal committee, the special joint committee on the Constitution of Canada. You will find that report to be a very useful source. Those are really the only published sources that I know about, Mr. Chairman.

**Mr. Chairman:** Thank you.

**Dr. Hogg:** Mr. Chairman, if it is agreeable to you, what I would like to do is speak very briefly about the history. I understand you have talked about the history this morning, so I only want to spend about five minutes on that. Then I would like to go through Quebec's five demands and take you through the text that reflects the agreement on each of those five points. That leaves the Senate and the first ministers' conferences as topics which were not included in Quebec's five demands and which I would then look at at the end. That is how I plan to proceed if that is acceptable.

**Mr. Chairman:** Please go ahead.

**Dr. Hogg:** The reason I want to repeat the very recent history is that I do think it is absolutely critical to understanding the accord. The roots of the accord, if one goes back just a very short distance, are to be found in Quebec's referendum on sovereignty-association, which was held in 1980. As everybody recalls, that referendum was defeated by a popular vote of 60 per cent to 40 per cent, but in the referendum campaign it seems to me to be clear that the federalist forces promised that a no to sovereignty-association was not a vote for the status quo and that the defeat of the referendum would be followed by constitutional change designed to better accommodate Quebec's aspirations.

Following the referendum, a process of constitutional discussions immediately took place. There is no need for me to take you through that, except to notice that when the agreement was reached on November 5, 1981—the agreement that subsequently became the Constitution Act, 1982—it did not satisfy that particular objective. It did many good things. It gave us a Charter of Rights, patriated the Constitution, gave us an amending formula and did some other things, all of which nearly everyone applauds; but what it did not do was to make the Constitution more acceptable to Quebec, that objective was not achieved.

It was not achieved in a technical sense because you will recall that the Premier of Quebec was the sole dissenter from the agreement of November 5, 1981. On top of that, the settlement did diminish the powers of the government and legislature of Quebec. It diminished them because the amending formula did not include a veto for Quebec, something which in practice had always been accepted in the past. The Charter of Rights restricted the powers of the legislature of Quebec in a number of ways, in particular by rendering unconstitutional the so-called "Quebec clause" of Quebec's school law, which restricted admission to English-language schools. That was a particular bone of contention, and the Supreme Court of Canada a couple of years later confirmed that the charter had indeed struck down the "Quebec clause" of Quebec's English school language law.

The bad side of the Constitution Act, 1982, was that it caused some diminution in Quebec's powers without Quebec's consent and created a profound sense of grievance in Quebec. To cure



that fault in the Constitution Act, 1982, is the chief purpose of the Meech Lake accord. The Meech Lake accord stems from five demands that were made by Quebec after Quebec's government had changed to the present Liberal government of Premier Bourassa and the government of Canada had changed to the present Progressive Conservative government of Prime Minister Mulroney.

Quebec made five requests. They were as follows, and I plan to go through the accord under these five headings. The first was recognition of Quebec as a distinct society. The second was a greater provincial role in immigration. The third was a provincial role in appointments to the Supreme Court of Canada. The fourth was a limitation on the federal spending power. The fifth was a veto for Quebec on constitutional amendments.

I am a relative newcomer to Canada. I came in 1970, so I do not have the experience that nearly everybody else in this room has, but I do believe that it was an important historical moment, if you like, when the Meech Lake accord finally did reach agreement on those five matters. I do not believe that ever before has it been possible to give an answer to the question, "What does Quebec want?" At Meech Lake, Quebec said, "This is what we want." I think that was an extraordinarily important development.

The Meech Lake accord has had some practical effects as well because of Quebec's exclusion from the 1982 agreement. Although Quebec was legally bound by the Constitution in 1982, its exclusion did cause Quebec to take a number of steps which in effect were protests against the Constitution. One of those steps was that Quebec refused to participate in constitutional discussions, which essentially involved operating the new amending procedures to which it had not agreed.

The consequence of Quebec not participating in future constitutional discussions means it is really impossible to have any serious constitutional change without Quebec at the table. I think that is an important problem, a problem that has been resolved by the agreement at Meech Lake.

Another thing that Quebec was doing as a protest to the 1982 act was that it was opting out of the Charter of Rights to the greatest extent possible. As the committee knows, the Charter of Rights contains an override, opting-out or "notwithstanding" clause. Quebec put that clause into every single one of its existing statutes and the constitutional validity of that is not clear because it is being litigated now in the Supreme

Court of Canada; but essentially Quebec tried to remove all of its existing statutes from the scope of the charter and started to put the clause in as a matter of routine in every new statute it enacted.

The Liberal government under Premier Bourassa, once the negotiations for the Meech Lake accord got under way, stopped the practice of automatically putting the "notwithstanding" clause in the statutes, but obviously if the Meech Lake accord were to fail, presumably Quebec would want to resume the protests that it was formerly engaging in. It was not just the Parti québécois government; it was the Liberal government as well.

There were some fairly important consequences of Quebec being alienated from the Constitution, notwithstanding the fact that Quebec was literally bound by the terms of the Constitution.

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Let me turn now to the five points and how they have been implemented in the accord. The first point was the recognition of Quebec as a distinct society. That is reflected in section 1 of the accord, and it is adding a new section 2 to the Constitution Act, 1867. I will not read the whole of the section, but I will just read the first subsection 1, because that is really the leading part of it. The new section will read:

"(1) The Constitution of Canada shall be interpreted in a manner consistent with

"(a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and"—here is the clause that Quebec sought—

"(b) the recognition that Quebec constitutes within Canada a distinct society."

This clause has given rise to a lot of difficulty. It is perfectly true that the phrase "distinct society" is not defined and so it is hard to know exactly what it means. The critics of Meech Lake tend to emphasize, and emphasize rightly, that there is a good deal of vagueness in that clause.

For my part, I am not so troubled with the vagueness of it. Let me explain why I do not think the vagueness of it is such a serious problem.

First of all, the provision is only an interpretative provision. It is simply a rule of interpretation. It does not confer any new power, nor does it deny any power, so that its chief relevance is really only for when other constitutional provisions are vague or ambiguous and where reference

to the idea of a distinct society would help to resolve the ambiguity.

I have tried to think of the kinds of issues where the "distinct society" clause might be helpful in resolving an ambiguity, and it is very difficult to find legal issues to which the "distinct society" clause would provide a helpful role in interpretation. Although I do not think the "distinct society" clause is totally ineffective, primarily I think it is an affirmation of a sociological fact and it does not have a great deal of direct legal significance. That is my first point.

A second point is that whatever the "distinct society" means in section 2, it does not mean a society that is exclusively French-speaking. We can say that categorically because in subsection 2(1) itself the recognition that Quebec constitutes within Canada a distinct society is preceded by the so-called duality clause; and the duality clause recognizes, among other things, that there are English-speaking Canadians present in Quebec. So I take it to be a compelling inference that the distinct society of Quebec is a society in which there is an English-speaking minority living along with the French-speaking majority.

So I think the suggestion that has occasionally been made that in some fashion the Meech Lake accord delivers over the English-speaking minority to the hands of a French-speaking majority is clearly incorrect.

Let me turn now to the effect of the "distinct society" clause on the Charter of Rights. The first point to make is that the "distinct society" clause does not override the Charter of Rights. On the contrary, because the "distinct society" clause is simply a rule of interpretation, it is subordinate to the Charter of Rights, so that a law passed by Quebec to promote its distinct identity would, like any other law, have to comply with the Charter of Rights. If the law was contrary to the Charter of Rights, it would be invalid.

There is one indirect way in which the "distinct society" clause may impinge on the Charter of Rights. As members of the committee know, a law that is inconsistent with a charter right can be saved by section 1 of the charter. Section 1 of the charter is the section that says the rights and freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." A law that is held to violate a charter right will be upheld if it is a reasonable limit on the charter right and if it can be "demonstrably justified in a free and democratic society."

A very recent example of the use of section 1 was the *Edwards Books and Art* case upholding

Ontario's Sunday closing law. Ontario's Sunday closing law was held to be contrary to freedom of religion, but the Sunday closing law was held to be a reasonable limit designed to produce a secular day of rest.

In deciding the question of whether a law is a reasonable limit on a charter right, one of the things the Supreme Court of Canada has said you look at is the purpose of the law. If a law had as its purpose the promotion of Quebec's distinct society, then that would undoubtedly serve as a purpose which could help to persuade a court that the law was a reasonable limit "demonstrably justified in a free and democratic society."

Quebec can do that now. Quebec can, without Meech Lake, offer its facts about Quebec's distinct society in justification of a law that arguably infringes a charter right. What the new section 2, the new "distinct society" clause, will do is give that line of argument some added weight. In that indirect fashion, the "distinct society" clause could somewhat expand the power of the legislature of Quebec to derogate from the charter.

#### 1430

One of the things that the committee will want to consider is, of course, how serious that problem is, the fact that the "distinct society" clause may indirectly assist the Quebec legislature to derogate from the charter. One point that should be remembered in assessing that question is that no legislative purpose, no matter how legitimate, is automatically regarded by the court as justification for a law under section 1 of the charter.

The Supreme Court of Canada in the *Oakes* case has emphasized that a proportionality test has to be satisfied as well and, among other things, the proportionality test requires the court to be satisfied that the law impairs the guaranteed right as little as possible or, in other words, uses the least drastic means to accomplish its objective. The proportionality test also requires the court to balance the injury to the guaranteed civil liberty against the legislative purpose. So the court does exercise a balancing role in deciding whether a law that is designed to meet an admirable purpose can justifiably infringe on a charter right. The court would undoubtedly do that, even if the purpose of the law was to promote Quebec's distinct society.

The second point about the Charter of Rights is this. As you know, section 33 of the Charter of Rights permits any legislature to override the Charter of Rights. That is what Quebec has been



routinely doing as a protest against the Meech Lake accord.

**Mr. Chairman:** Do you mean the Constitution Act? You said the Meech Lake accord.

**Dr. Hogg:** I am sorry. Yes. That is what Quebec was doing routinely after the Constitution Act, 1982.

The point I am making now is that the Quebec legislature can escape from most of the provisions of the charter right now through the use of section 33. So even without the "distinct society" clause, if Quebec wants to derogate from, for example, freedom of expression, which is one of the guarantees that has been offered as an objection to Quebec's commercial signs law, it can do that through the use of section 33. It can do that without Meech Lake, without any recourse to a "distinct society" or anything else, just simply by using the power under section 33 to add a "notwithstanding" clause to the legislation.

A final point—and then I will leave the Charter of Rights, although I am very happy to come back to it at the end of my presentation if people want to talk some more about it—is that women's rights have a special protection in the charter. It is contained in section 28 of the charter, which is essentially Canada's version of the equal rights amendment that failed in the United States. Section 28 provides that, "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

Section 28 cannot be overridden by a "notwithstanding" clause under section 33 because it opens with the phrase, "Notwithstanding anything in this charter." It is arguable, although it is not absolutely certain, that sexual equality cannot be derogated from even under section 1 because of the phrase, "Notwithstanding anything in this charter," at the beginning of section 28. While it is not possible to be absolutely categorical about what section 28 means or what degree of protection it provides, it may be that section 28 would in effect even overcome the "distinct society" clause if the "distinct society" clause were used as a ground for justifying a law that discriminated against women under section 1.

I would like to leave the "distinct society" clause at this point and turn to the next of Quebec's demands, which was a greater provincial role in immigration. That aspect of the accord was given effect to by clause 3 of the schedule, adding new sections 95A to 95E to the Constitution Act, 1867.

The purpose of the new sections 95A to 95E is to provide a mechanism for the establishment of defined roles for the two levels of government in the field of immigration. The present constitutional position is contained in section 95 of the Constitution Act, 1867. What section 95 does is grant to the federal Parliament and the provincial legislatures concurrent powers over immigration. It is one of the few provisions in the Constitution Act, 1867, that grants powers to both levels of government.

Section 95 accords paramountcy to the federal law where there is a clash between the federal and the provincial law. What section 95 does not do is to explain how these shared powers ought to be shared. This is of particular concern to Quebec because Quebec has always been more concerned than the other provinces about the size and composition of its immigrant groups and particularly about their ability to settle in a predominantly French-speaking environment.

#### 1440

Since 1971, immigration to Quebec—it is immigration to Canada, but immigration by those immigrants that indicate an intention to settle in Quebec—has been governed by a series of agreements between the federal and Quebec governments. The current agreement is the so-called Cullen-Couture agreement of 1979. The main purpose of those agreements is to enable Quebec to participate in the selection of those persons who are going to settle permanently or temporarily in Quebec.

Six other provinces have also entered into agreements. Ontario, which is the main recipient of immigrants, has never entered into an agreement with the federal government, nor has British Columbia or Manitoba.

What the new 95A to 95E sections do is they make provision for giving constitutional status to immigration agreements like the Cullen-Couture agreement.

From Quebec's point of view, an objection to the system of agreements prior to Meech Lake, was that they did not have constitutional status and therefore they could be abrogated by a federal statute. So Quebec took the view, apparently, that a mere agreement was not a secure enough basis for the sharing of powers over immigration. What the new provisions will do will be to confer constitutional protection on an immigration agreement so as to shield it from the unilateral power of the federal Parliament.

That shield is not complete because 95B(2) preserves a degree of federal legislative power. It says "An agreement that has the force of law

under subsection 1"—that is the immigration agreement—"shall have effect only so long and so far as it is not repugnant to any provision of an act of the Parliament of Canada that sets national standards and objectives relating to immigration or aliens, including any provision that establishes general classes of immigrants, or relates to levels of immigration for Canada, or that prescribes classes of individuals who are inadmissible to Canada."

By entering into an immigration agreement, the federal Parliament does not lose its authority to set national standards and objectives relating to immigration or aliens. For example, a change in federal policies regarding immigration would not necessarily require the renegotiation of every immigration agreement, but could be implemented by a law that set new national standards and objectives.

Let me turn now to the third element in the Quebec list, which was a provincial role in appointments to the Supreme Court of Canada. Those provisions are to be found in clauses 4 and 5 in the schedule to the accord. They are the new sections 101A to 101E that are going to be added to the Constitution Act, 1867.

These provisions do a good deal more than simply provide a provincial role to appointments to the Supreme Court of Canada. What they essentially do is set out the basic elements of the Supreme Court of Canada in text that will become part of the Constitution.

The provisions provide for the existence of the court, for the fact that there are to be nine judges. It makes provision for the appointment of the judges. It provides that three of the judges must come from Quebec. There are guarantees of independence buried in section 101D, and 101E makes clear that changes to the court can be enacted by the Parliament of Canada provided they do not touch the matters that are now contained in the constitutional text.

One result of this part of the Meech Lake accord is to place the Supreme Court of Canada in the Constitution. Up until now, the Supreme Court of Canada was a purely statutory court and, theoretically at least, it could actually be repealed by the unilateral action of the federal Parliament. It had always been a bone of contention in federal-provincial discussions that the court, which serves as the arbiter of federal-provincial constitutional disputes, ought not to exist by the sufferance of one level of government, but ought to be protected by the Constitution. That is one thing the Meech Lake accord does that most people regard as a very important step.

Of course, the really controversial part of the Meech Lake accord is the new provisions for the appointment of judges. You can see those provisions if you start at subsection 101A(2). The leading provision says, "The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal." The appointing power remains with the Governor General in Council or the federal cabinet.

But subsection 101C(1) goes on to say, "Where a vacancy occurs in the Supreme Court of Canada, the government of each province may, in relation to that vacancy, submit to the Minister of Justice of Canada the names of any of the persons who have been admitted to the bar of that province and are qualified under section 101B for appointment to that court."

Subsection 101C(2) goes on to say, "Where an appointment is made to the Supreme Court of Canada, the Governor General in Council shall, except where the Chief Justice is appointed from among members of the court, appoint a person whose name has been submitted under subsection (1) and who is acceptable to the Queen's Privy Council for Canada."

#### 1450

The way the system works is that the federal government is obliged to appoint to the Supreme Court of Canada a person whose name has been submitted by the province from which the vacancy comes. For example, when one of the three judges from Quebec dies or retires, the vacancy would have to be filled from Quebec by a person who is acceptable both to the government of Quebec and to the government of Canada. Similarly, there are by convention three judges from Ontario. If one of the three Ontario judges died or retired, fidelity to past practice would require that the vacancy be filled from Ontario by a person who is acceptable to both the government of Ontario and the government of Canada.

The new section 101C contains no provision for breaking a deadlock, and that has been a point of criticism of the accord. What is to happen if the federal government finds none of the names submitted by a province to be acceptable? That is the problem. It seems to me that is not a realistic concern where the vacancy to be filled is outside of Quebec because if the federal government finds the list of names submitted by one province to be unacceptable, it can consider the list from another province. That is even true when the



vacancy comes from Ontario, because although Ontario has an informal quota of three judges on the court, that quota is not a hard-and-fast rule. In fact, it has been departed from in just the last few years when, for example, Mr. Justice McIntyre from British Columbia was appointed to replace Mr. Justice Spence from Ontario. That reduced Ontario's quota to two. Ontario's quota was then later restored to three when Madam Justice Wilson from Ontario was appointed to replace Mr. Justice Martland from Alberta.

When any one of the six non-Quebec judges dies or retires, the federal government effectively has a choice of provincial lists and can shop around among the provincial lists for the very best candidate. When the vacancy is from Quebec, however, there is no escape from the requirement that the governments of Quebec and Canada do have to reach an agreement on a candidate. In the event that no agreement could be reached, then no appointment could be made and the court would have to function with only eight members. Presumably, that situation would continue with a court of only eight members, including only two Quebecers, until the political situation changed so as to enable the deadlock to be broken.

One of the issues that the committee will have to decide is whether it is acceptable to have provisions of this kind without a deadlock-breaking mechanism. It is not very easy to design a deadlock-breaking mechanism. My feeling is that probably this is the kind of issue upon which governments would come to an understanding and that a deadlock is unlikely to occur. Obviously, that is a matter of judgement upon which I have no special expertise.

Another criticism that has been made of the new sections on the Supreme Court is that they effectively exclude from appointment lawyers from the territories. They do that because names have to be submitted by the government of a province. The names have to be the names of persons who have been admitted to the bar of the province.

If you look at section 101C, which provides for the submission of names, it does not make room for a lawyer from the territories to be placed on a list, even though a person from the territories is technically qualified under section 101B. It is a funny omission in the proceedings that a lawyer from the territories is qualified under section 101B but has no way to get on a provincial list because of the way section 101C is drafted. That seems to me to be an unfortunate omission and

one that it would be desirable to correct if there is a way of doing so.

There has been another criticism of appointments to the Supreme Court of Canada, to which the Meech Lake accord does not respond. The Meech Lake accord does respond to the criticism that the provinces have not hitherto played a role in the appointment of judges. That is now dealt with by the Meech Lake accord; but the Meech Lake accord does not meet the criticism that the appointing process ought to be more open and ought to be better informed by the views of the people outside government.

Two committees of the Canadian Bar Association have considered this problem and one committee of the Canadian Association of Law Teachers has considered the problem. All three committees have recommended that the names of candidates for appointment to the bench should be generated by a well-informed advisory committee, a committee that could include representatives of government, that could include representatives of the bench, representatives of the bar, but that should also include nonlawyers.

It seems to me that a committee of that kind ought to be established in Ontario to suggest to the government of Ontario the names that the government of Ontario is now obliged to submit to the federal government for appointment to the Supreme Court of Canada. Clearly, a committee of that kind need not be provided for in the Constitution; perhaps a committee of that kind need not even be provided for by statute. It could be purely informal. But I do think that the Meech Lake accord takes only one step in the direction of opening up the appointing process and that it would be highly desirable for the government of Ontario to take a further step in the opening up of the process.

Whether or not the government of Ontario establishes committees of the kind recommended, I do not think there is any reason to suppose that the quality of appointments to the Supreme Court of Canada will be diminished by the Meech Lake procedures. I cannot see why the fact that a person has to be acceptable to two governments would produce weaker candidates than simply having to be acceptable to one government. As I said earlier, it seems to me that for some appointments at least there may be a healthy competition among provinces to try to bring forward the strongest candidate so that the federal government is encouraged to appoint the candidate from one's own province as opposed to the candidate from some other province, so I

think that the high quality of appointments to the court will be continued under the new accord.

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The fourth point—I am sorry, this is taking a little longer than I thought—is the limitation of the federal spending power. That part of the accord is contained in subsection 106A(1), a new subsection to be added to the Constitution Act, 1867. Subsection 106A(1) provides: “The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives.”

The purpose of this provision is to limit the spending power of the federal government. If the spending power is used to establish a national shared-cost program in an area of exclusive provincial jurisdiction, then section 106A requires, in effect, that the program must include an opting-out alternative for a province that chooses not to participate in the national program.

Any province that does choose to opt out of the national program must receive “reasonable compensation” from the government of Canada, provided that the province carries on a program or initiative that is “compatible with the national objectives.” That is a change in the present constitutional position, which is that the federal Parliament does not need to compensate provinces that choose not to participate in a national shared-cost program.

My first comment on section 106A is that it constitutes something of a clarification of federal power. Section 106A assumes a number of things that have hitherto been regarded as controversial. Section 106A assumes that the federal Parliament possesses the power to establish and fund a shared-cost program in an area of exclusive provincial jurisdiction. It also assumes that the federal Parliament can attach conditions to its grants to the provinces, because cost sharing contemplates grants that are conditional. Finally, section 106A assumes that there can be “national objectives” in an area of exclusive provincial jurisdiction.

It is my view that all of those propositions are correct as a matter of constitutional law, but they are controversial. For example, they are challenged by litigation at the moment brought by both the Ontario Medical Association and the Canadian Medical Association to challenge both

the federal Canada Health Act and the provincial extra-billing legislation. I think section 106A does contribute to federal power by clarifying the broad scope of the federal spending power even in areas of exclusive provincial jurisdiction.

What section 106A also does is limit the federal power through the obligation to provide reasonable compensation to a province that carries on a program or initiative that is compatible with the national objectives.

I think it is unfortunate that the phrase “national objectives” was not given a clearer definition in the constitutional text. However, in the context of section 106A, I think it is clear that “national objectives” must mean the objectives of the national shared-cost program. For example, if the federal government were to establish a national shared-cost program for day care, a province could not use the money for public roads on the grounds that public roads were also national objectives. What I think the section contemplates is that the province must adhere to the objectives set by Parliament for the national shared-cost program, and all that is permitted is some variation in the means by which those objectives are to be accomplished.

Let me turn now to the fifth and last of Quebec’s points, which was a veto on constitutional amendments. That is accomplished by the amendments to sections 40 to 42 of the Constitution Act, 1982, which are contained in clauses 9 to 12 of the schedule to the accord. These provisions are lengthy but they boil down to two fairly simple points.

The first point is contained in section 40 and concerns the right of a province to receive compensation for opting out of a constitutional amendment. As the members of the committee will recall, the current amending procedures—that is, the amending procedures that were adopted in 1982—permit a province to opt out of certain kinds of amendments that derogate from the powers of the province.

One of the disincentives to opting out is that it could carry a financial penalty. Suppose, for example, that provincial authority over prisons was transferred to the federal Parliament. If Quebec opted out of an amendment of that kind, it would have to bear the financial responsibility of operating the prisons in Quebec, while in the other provinces the federal government would pick up the bill for the prisons. The fact that it may carry a cost to the taxpayers of the province operates as a disincentive to opting out.

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Under the existing amending procedures, that problem was only partially met by section 40. Section 40 of the existing provisions provides that where an amendment transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply. Any province opting out of an amendment relating to education or other cultural matters was entitled to compensation, but not from other amendments. In my prisons example, Quebec would not be entitled to compensation if it opted out of a change of that kind.

The new section 40 added by Meech Lake will extend the right to compensation to all changes that transfer legislative powers from provincial legislatures to Parliament, not just changes relating to education and other cultural matters.

That is the first of the two important changes that are wrought by Meech Lake in the amending procedures.

The second change concerns the procedure for certain amendments affecting the Senate, the House of Commons, the Supreme Court of Canada and the establishment of new provinces. Those matters at the moment are covered by section 42 of the amending procedures, which means that they can be accomplished by the seven-province formula, or the seven-50 formula. That is the general amending formula that requires seven provinces representing at least 50 per cent of the population.

What Meech Lake does is to take those matters that are now in section 42 and that are therefore subject to the so-called seven-province formula and move them into section 41, which requires unanimity. All the matters formally listed in section 42 which, as I say, deal with the House of Commons, the Supreme Court of Canada and the extension of provinces or the establishment of new provinces, now become subject to unanimity.

As far as those matters are concerned, Quebec has a veto because the unanimity requirement gives every province a veto. With respect to other changes, Quebec does not get a veto, but the full compensation for opting out was evidently regarded by the government of Quebec as being a satisfactory alternative to a veto.

A criticism that has been made of these amending procedures that is clearly correct is that it will make the Constitution more difficult to amend. It means, for example, Senate reform will require unanimity now, whereas before

Meech Lake, the seven-province formula would have done it. It means as well that the establishment of new provinces requires the unanimous agreement of all existing provinces, whereas before Meech Lake, the seven-province formula would have sufficed. So the amendments do have the unfortunate result of making the Constitution more rigid.

That covers all of Quebec's five matters. However, the accord goes on to deal with two other points. If I may briefly refer to those, I will then be finished. The first of these is the Senate. The important provision regarding the Senate is the new section 25 of the Constitution Act, 1867, which is contained in section 2 of the schedule to the accord.

What section 25 provides is that when a vacancy occurs in the Senate, the government of the province to which the vacancy relates must submit names to the federal government and then the federal government must fill the vacancy from the names submitted by the province. It is a procedure somewhat similar to the procedure for appointments to the Supreme Court of Canada.

This provision was not one of Quebec's five conditions for adherence to the Constitution Act, 1982. The only reason it is in there, as I understand it, is that some of the western governments were reluctant to enter into a constitutional agreement that made no reference to Senate reform. The solution was to put into the Constitution the provision for provincial nomination to the Senate. Although it is not expressed as an interim measure, it is intended to be an interim measure until a more far-reaching reform of the Senate is agreed to.

The ultimate goal, as I understand it, at least of British Columbia and Alberta, is a triple-E Senate, which will be elected, equal and effective. One thing that troubles me about section 25 is that if it does not prove to be possible to reach agreement on a triple-E Senate in future constitutional discussions, section 25 will become the permanent way of filling vacancies in the Senate. It seems to me to be unfortunate to have members of a federal legislative body who are appointed by a province and who are not accountable or recallable until their death or retirement.

My final point is that the Meech Lake accord made provision for future first ministers' conferences. There are two provisions that deal with that. One which is not particularly important is in section 8 of the accord. It adds a new section 148 requiring a meeting of the first ministers every

year to discuss the state of the Canadian economy.

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The second provision is much more important, and it is a new section 50 of the Constitution Act, 1982. It is contained in section 13 of the schedule to the accord. This requires that there be a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces every year, commencing in 1988.

Subsection 50(2) provides that "The conferences convened under subsection 1 shall have included on their agenda the following matters:

"(a) Senate reform, including the role and functions of the Senate, its powers, the method of selecting senators and representation in the Senate;

"(b) roles and responsibilities in relation to fisheries; and

"(c) such other matters as are agreed upon."

The impulse of this undoubtedly was the concern of those premiers that after the Meech Lake accord, the first ministers would not continue the process of constitutional change and move on to the Senate, fisheries and other matters. This provision provides some guarantee that those items will appear on future constitutional agendas.

I think the provision is unfortunately drafted because it appears to mandate a constitutional conference every year into the indefinite future, which seems to call for an undue preoccupation with constitutional reform. It also requires that every one of the conferences have on its agenda every year Senate reform, fisheries and such other matters as are to be agreed upon. Again, you get tired of the Senate and fisheries as they remain on the agenda year after year.

I assume that what is really intended is that, as agreements are reached on those matters, section 50 itself would be amended to strike out the agenda items about which it is no longer sensible to keep talking. It is an odd use of a Constitution to put in it provisions that you are planning to knock out again in a few years' time. It is treating the Constitution a bit like an income tax act.

**Mr. Breagh:** The guys are going to talk politics and fishing.

**Dr. Hogg:** Mr. Chairman, that concludes my presentation. I will be happy to respond to any questions that you or any of the other members of the committee wish to put to me.

**Mr. Chairman:** Thank you very much. I think in the best sense we have all gone back to university and followed through a most thorough

review of the act, and that was extremely helpful. Because of your last remarks, I am not sure whether at some point we are going to feel as if we need to launch a class action against parts of this accord, but we may indeed, if there are constitutional meetings every single year, get rather fed up with it all after a while.

**Mr. Offer:** Professor Hogg, you opened your discussion with references to the "distinct society" clause. I think you spoke about it in terms of it being an affirmation of a sociological fact. I am sure you are aware that there have been concerns expressed by other groups—and I am going to use as an example, women's groups—that this "distinct society" clause may negatively impact upon their rights. I am wondering if you might share with us your thoughts as to the impact of the "distinct society" clause on women's rights.

**Dr. Hogg:** I think the main problem with the "distinct society" clause is that it is not particularly clear. Therefore, it is difficult to be categorical about exactly what its implications are. Groups such as women's groups are understandably concerned that the very vague language may have unexpected or unintended repercussions on their rights. I think they have a very legitimate concern.

I do think, as I said earlier on, that the "distinct society" clause will have some indirect effect on the Charter of Rights through section 1 of the Charter of Rights. It is not possible to say for sure that it will have no effect on women's rights. It may have, but it seems to me, first, that it is hard for me to imagine the use of the "distinct society" clause to discriminate against women. Perhaps it is possible, but it is not easy to think of examples under which the government of Quebec would want to do that, but obviously, one cannot say that it is absolutely impossible.

The other point of uncertainty in the whole picture is the point I made earlier about section 28 of the Charter of Rights, because section 28 does, in effect, place sexual equality on a higher level than other rights guaranteed in the charter and it is quite possible that section 28 may operate as a protection for sexual equality which other rights do not have. But again, because section 28 is not entirely clear, just as the "distinct society" clause is not entirely clear, it is difficult to be absolutely confident about what the impact of the "distinct society" clause is.

**Mr. Offer:** If I may just continue on this line, I think in your discussion you talked about how section 28 does contain the opening word "notwithstanding." Please correct me if I am reading something into your remarks that just is



not there. You indicated that because of that word, "notwithstanding," it might operate above, for instance, section 1 of the charter. This is something which ought to be made clear in discussing the impact of the "distinct society" clause vis-à-vis women's rights. I am just wondering if that is a fair reading of your comments?

**Dr. Hogg:** Yes, that is a fair reading of my comments, that the opening words, "Notwithstanding anything in this charter," could be read as excluding even section 1 from any derogation of sexual equality. As, in my view, the only effect of the "distinct society" clause comes through section 1, that would have the effect of protecting sexual equality even from the "distinct society" clause. I wish I could be absolutely categorical and say, "That's the way it is," but I do not think it is so clear that we can be absolutely certain that a court would decide that way; but I think there is a powerful argument that is correct.

**Mr. Allen:** I really appreciate the presentation that Professor Hogg has made. It certainly has clarified a number of matters, if not for the rest of the committee certainly for myself, and helps us as we get under way. I want to come back to part of the question that was just asked in relation to "distinct society", but I want to begin by asking you about language and constitutions and constitutional law over against the language of legislation in general.

Am I correct in thinking that there is some preference in constitutional law to use language of a more general nature and that constitutional law is interpreted in a somewhat different fashion than is normal with statutory law in general, and that this might affect the way in which we might look at this accord in terms of the precision we might expect or should expect?

What are your views on that? I think it does pertain to questions such as "distinct society" and how far you should go in trying to pin down quite exact and precise meanings in a constitutional document.

1530

**Dr. Hogg:** Yes, that is quite correct, Dr. Allen. What is different about a constitution as opposed to an income tax act is that it is expected to last for a very long period of time and to cover a lot of entirely unforeseen conditions and circumstances, so the normal style of constitutional drafting is to use rather more general language than you would expect to find in an ordinary statute and to leave more to judicial interpretation than you would normally be willing to do with an ordinary statute. I think that

is a fair point and it is one reason a number of the provisions in the Meech Lake accord are a good deal vaguer than perhaps you would be willing to tolerate in a statute of the Ontario Legislature.

**Mr. Allen:** I think that is very important to establish as we look at this particular document and work our way through it.

Second, coming to the question of "distinct society", and for example the Quebec protest using the override option in effect to put the charter to one side and not recognize or be involved in all that stuff because it was not willing to recognize it and felt excluded from it: can I ask you what the significance would be in that context of Quebec's own Charter of Human Rights and Freedoms?

For example, while that tendency of the Quebec government might have given some concern to various groups, whether women, multicultural groups, ethnic groups or what have you, specific groups in Canada at large, as to a trend of action on behalf of the provincial government in Quebec, some would certainly maintain that Quebec has a very good record vis-à-vis the other provinces with respect, for example, to recognizing women's rights. There is a Charter of Human Rights and Freedoms in Quebec which is very extensive; and in some respects is stronger even than the charter at some points, and other similar documents in other provinces.

Under those circumstances of putting the charter to one side in that legislation, how would that impact on recognition of similar points within Quebec's own equivalent document?

**Dr. Hogg:** The use of the override clause to put the charter to one side was a purely symbolic gesture because, as you say, it left in place Quebec's own Charter of Human Rights and Freedoms which is, again as you said, a more extensive guarantee of civil liberties than the Charter of Rights itself. The use of the override clause for the national charter did not signal in any way a disrespect for civil liberties in the province of Quebec. They were still protected by the Quebec Charter of Human Rights and Freedoms. As you rightly say, I think most observers take the view that the Parti québécois government in Quebec and the Liberal government in Quebec have had a good record in the protection of civil liberties. It is not really a threat to civil liberties that was involved in the use of the override clause for the charter.

**Mr. Allen:** Could one say that the term "distinct society" necessarily includes in its definition, when you get down to points, the

Quebec Charter of Human Rights and Freedoms and the sentiments and philosophy that are embodied within it?

**Dr. Hogg:** That is a very interesting point. I have never put my mind to that. I have had trouble, I must say, in formulating a definition of Quebec's "distinct society", but certainly the Quebec Charter of Human Rights and Freedoms has been in place in Quebec for a long time. I am not sure when it was introduced; the year 1965 comes into my head, but I am not sure whether that is correct. It predates the charter by many, many years.

I think it certainly provides something of an answer to those people who fear that there will be illiberal or oppressive legislation coming from Quebec. There is no basis whatever for that fear, other than the normal vicissitudes of politics.

**Mr. Allen:** Finally, on the question of Quebec in general vis-à-vis the Constitution, we have all heard the language in the days since Meech Lake that it is necessary to get Quebec back into the Constitution. Perhaps you could give us a few words from your view as to how far Quebec was outside the Constitution, because I sense that that is not an absolute statement. How far did it get outside, in a sense, as a result of the rejection of 1982?

**Dr. Hogg:** Speaking as a lawyer, I can say that Quebec was not outside the Constitution at all, since the Constitution Act, 1982, had been adopted into law by the correct procedure, which at that time was the enactment of the Parliament in the United Kingdom. That was sufficient to make it binding in Quebec and everywhere else. In all important respects, the act was legally binding in Quebec.

I think that what was missing was a sense of moral or political legitimacy. The entire National Assembly of Quebec voted unanimously to reject the Constitution Act, 1982. That, I think, set the tone for attitudes in Quebec towards the Constitution. I think some important practical consequences did flow from that feeling of illegitimacy. One was the refusal to participate in constitutional conferences.

One of the reasons offered for the failure of the constitutional conferences to establish aboriginal self-government was that Quebec, which has historically been sympathetic towards aboriginal claims, was not at the table. I think that was a pretty important consequence of Quebec's sense of illegitimacy.

Obviously, the routine overriding of the Charter of Rights was of some importance, although, as you rightly point out, the people of

Quebec continued to be protected by their own charter of rights; so perhaps that was not as important, but still they could not invoke the national rights of the national charter.

Other than that, I think probably the other main consequence was that it would linger as an historical grievance which, if questions of sovereignty and separation were to come up again—as, of course, they are likely to do—they could always be invoked against Canada: "You promised us before the referendum in 1980 that there would be change to better accommodate our aspirations. That promise was never fulfilled. Why should we listen to you now?" I can see that kind of argument, and it would seem to me to be a very telling and very powerful argument in the event of a further nationalist, separatist development in Quebec.

**Mr. Allen:** Thank you very much. I will suspend my questions for now.

Can I make a procedural suggestion? Can we stay on themes? Can we stay with "distinct society" questions, for example, and move in that fashion? Would that be helpful in keeping our heads together this afternoon?

**Mr. Chairman:** I am in the committee's hands. My next questioner is Mrs. Fawcett. Were you on the—

**Mrs. Fawcett:** Yes.

**Mr. Chairman:** OK. Then we certainly will for the next question.

**Mrs. Fawcett:** I, too, Dr. Hogg, am very grateful for your very fine presentation. In referring to this "distinct society" clause, to me there is a perception in the general public that the Quebec people could get more concessions or get better treatment, or whatever people have in their heads; that they are sort of set apart.

What would happen if you inserted in clause 2(1)(b), "the recognition that Quebec constitutes within Canada a distinct society," the small word, "too," so it read, "the recognition that Quebec, too, constitutes within Canada a distinct society"? What horrible legalities are involved there? Does that not mean there are other groups, such as the aboriginal groups, etc., but that Quebec, too, is distinct.

**Dr. Hogg:** I do not think that would give rise to any problems.

**Mrs. Fawcett:** Would it solve any?

**Dr. Hogg:** I am not sure that it would make any difference, because the way I read it I do not read it as meaning that Quebec constitutes the only distinct society within Canada. I do not think you need to read it that way.



**Mrs. Fawcett:** Would you agree that people do?

**Dr. Hogg:** I do not think that is a reasonable reading of it, particularly in the light of section 16. Section 16 of the accord is the one that says nothing affects, and then it lists a number of provisions, including the provisions regarding aboriginal peoples and the provisions regarding multiculturalism.

I think the intent of section 16 was to reinforce the proposition that Quebec was not the only distinct society within Canada. Perhaps it is not as clear as it might be, but I think that is the best interpretation of the provisions.

**Mr. Breagh:** I have a quickie on that; then I would like to move to a couple of other areas. I cannot conceive, because of the way it is laid into this agreement, that the "distinct society" clause will in any way detract from any rights or privileges that any other group in Canada has now. Can you identify for me any theoretical ways in which such a thing could happen?

**Dr. Hogg:** I think the theoretical argument—and it is appropriate to describe it as a theoretical argument—is that Quebec might pass a law that was discriminatory in some fashion and seek to justify it through section 1 of the charter by reference to the "distinct society" clause. I think that is about the strongest you can put the argument.

**Mr. Breagh:** Let me pursue that just a bit. Whenever we draft a law, one of the problems that we have as legislators is to find the words that actually mean our intention, that carry it out. We reach out for words that have been used repeatedly in law before, where there is case law to establish that a word really means what we think it means.

But no matter how hard you work at that, once the law is finished and we as legislators pass the law, we then lose it. It goes off to court, and God knows what two lawyers and judge and a court can do with what you said was a very simple concept. There is no hope in hell we could ever draft something that had a finite meaning that was not subject to argument before a judge, so we would be chasing an impossible task to try to define that more.

I think our concern is limited to whether there is a reasonable prospect that those words will cause evil things to happen. I am looking for someone who can give me a reasonable argument that is very likely to happen, and it has to be more than theoretical. They have to find for me a pretty specific case and some reasonable grounds for saying: "Wait a minute. If you actually let those

words stand in this agreement, these awful things will transpire." I am really grasping to try to find that because I know that is a matter of some concern to a lot of groups. I cannot seem to find anything other than the most abstract, theoretical argument that would carry that.

**Dr. Hogg:** Obviously, you are going to have to put that question to other witnesses because my view is that you do end up with some pretty hypothetical and theoretical argument in order to claim that the "distinct society" clause is a serious threat to civil liberties in Canada.

**Mr. Breagh:** OK. A couple of other quickies then. I cannot imagine that our current way of putting people in the Senate is so wonderful that anybody in this nation would object to some kind of formal public process for selecting people for the Senate. Similarly—I am probably quite wrong in this—I do not believe that our system of picking judges for the Supreme Court is all that perfect that it could not stand a little public exposure either. So I really do not see much there.

What I am left with in this agreement that is bothersome to me is that there now seem to be a number of groups in our society that feel—most of them, I think it not unfair to say, because they were not specifically mentioned in the accord or mentioned in the way they want to be mentioned—they have somehow lost rights which they had just attained. In other words, there are a fair number of groups that feel they had just gotten a Charter of Rights in Canada which gave to them some rights in law—some cases were now proceeding before various levels of the courts—and suddenly this accord rips those rights away.

My reading of what you had to say to us this afternoon is that this is not true. I have to confess that in looking through both the accord and the previous attempts at writing the Constitution, I do not see where the rights have been removed. I thought I saw in my reading of the accord a pretty concerted effort to kind of make sure that no rights previously given to a Canadian citizen were removed by this. It may be stated in somewhat different ways.

I would like to get your reaction to that because I know there will be a number of groups appearing here and that is the gist of their argument: that a right which they had just attained through the charter has now been removed or in some way impacted in a negative way by the accord. Again, I really have to get into the theoretical before you can see that actually happening. I would like you to react to that a bit.

**Dr. Hogg:** My opinion of it is essentially what I see buried in your question. It seems to me that there has not been any serious impact on anybody's rights; probably there has not been any impact on anybody's rights. I think there are two things which have contributed to the impression you have reported. One is because the first ministers tried to confine themselves to—and it was called the Quebec round of negotiations—the five issues that Quebec wanted to negotiate. They were not entirely successful in doing that because it spilled over into the Senate and a few other things. But generally speaking, they adopted a policy of negotiating only those five things.

Other groups have thought, "By negotiating only those five things, they left us out." They did, but of course it does not stop aboriginal groups from raising again the issue of aboriginal rights and so forth in future conferences. I think it was the confining of the agenda to Quebec's concerns that led to the exclusion of other perfectly legitimate reform proposals, but I do not think it took away anybody's existing rights.

Another thing that I think has contributed to the problem is that the Meech Lake process—and it has been the same process in all previous constitutional conferences; I do not single out Meech Lake—is terrible because it is just 11 first ministers sitting around a table reaching an agreement. That is not the full story, of course, because there is a long period of preparation and work by officials. But the process is a very closed one, and it seems to me that if Meech Lake had been preceded by hearings of the kind you are now holding and if groups that had concerns had had opportunities to address them before the text was finally nailed down, that would have been a tremendous help.

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I notice that your terms of reference are not exclusively devoted to simply an analysis of the present text, but it might be desirable to consider whether future constitutional conferences ought not to be preceded by committee hearings of some kind, not necessarily Ontario hearings but national hearings, which would then, I think, make the process a bit more open and would perhaps help to deal with these very national feelings of disaffection and alienation by people who feel they had absolutely nothing to contribute to a process which may have affected them.

**Mr. Breaugh:** One final question: Do you think the bizarre nature that was used by the first ministers to strike the deal—and I use the word

"bizarre" as the most polite word I can find for it—may in effect ruin the deal in the end?

Part of what you have just said is important. If people had had a chance to appear before legislative committees and if they had had the opportunity to make a formal submission—and in the final analysis maybe the first ministers did disappear behind a door with their advisers and say, "This was a good idea; this is crazy"—at least everyone would have known what the process was, would have had opportunity for some input and could have said, "They did not love me this time, but maybe next time."

I have some concerns that the bizarre, closed-door nature of the deal itself may have given rise to all these kinds of suspicions that "we got done in, but we are not quite sure how." I would like you to comment on that, because this morning we had testimony that said, "This will open up the process for change." Part of our job perhaps is to see if we can flesh that out. If there are things in here which are not as well explained as people would like, are there things we could do that would assist the process to become easier, more open and more understandable to resolve those problems?

**Dr. Hogg:** I certainly hope that the concerns about process do not lead to the defeat of the accord. I do agree that concerns about process probably do underlie a lot of the criticism. It does seem to me, though, that this committee ought to do two separate and distinct things. One is to examine the text of the accord on its merit, without regard to the process by which it was produced, and decide whether it is good or bad. I think a realistic assessment will be that it is good.

Second, as a completely separate matter, it would be very desirable to turn your attention to the process for the future so that the same difficulties are not repeated again. I think it would be unfortunate if what is basically a well-constructed accord—at least, that is my view—were to be defeated because the process by which it was produced has its faults.

**Mr. Cordiano:** With reference to section 16 and in the light of the "distinct society" clause, of course, there have been some criticisms about why section 16 was included. You made mention of that and referred to that earlier in some comments in answer to a question. I just want to know whether in your opinion section 16 has equal status, if you will.

The way I want to phrase it is, will section 16—or section 27 of the charter, more correctly—be diminished somehow? Will its impact be diminished by the "distinct society" clause in any



way, shape or form, or do courts have to keep both those things in mind when considering legislation?

**Dr. Hogg:** I think one of the problems with section 16 is that it singles out just two provisions of the charter, 25 and 27. It refers to two other provisions in the Constitution as well, but only two provisions of the charter. One of the concerns of, for example, women's groups is that by singling out two sections of the charter and saying these are not affected, maybe it is saying the others are affected. That has been a concern with section 16, and I think that if section 16 is leading to that view, then it is a very unfortunate provision.

I think the reason it was put in, though, was that multiculturalism and aboriginal rights seem to invoke similar distinct societies to the distinct society that is recognized in the main clause. To pick up Mrs. Fawcett's point, I think the feeling was that Quebec should not be regarded as the only distinct society.

**Mr. Cordiano:** The fact is that section 27 of the charter does not confer a right, as I understand it; it is also an interpretive clause.

**Dr. Hogg:** Yes, and that is also true of section 25. Both the provisions are not actually rights but are simply interpretive provisions.

**Mr. Cordiano:** Whereas when you look at section 28, it is referring to rights and freedoms referred to and guaranteed in the charter. When we are talking about sexual equality, there are definitely rights bestowed on both males and females in our society that are equal. That is what the charter is speaking to when it is referring to that section.

**Dr. Hogg:** It is difficult to characterize section 28 exactly, because sexual equality as a right is actually contained in section 15 of the charter. It is possible to think of section 28 as not conferring a new right but rather reinforcing and strengthening a right that exists elsewhere, so you might argue that 28 is a bit like 27 and 25.

**Mr. Cordiano:** You could argue that it is very similar to the preceding sections that refer to aboriginal rights and multiculturalism.

**Dr. Hogg:** Yes, I think you could make that argument. It is not entirely clear, but that could be argued.

**Mr. Cordiano:** So it is more of an interpretive section in that latter part of the charter.

**Dr. Hogg:** Yes.

**Mr. Chairman:** To be clear on that, you would argue that sections 25, 27 and 28 of the

charter are interpretive sections and that section 15 of the charter is the one that sets out the right.

**Dr. Hogg:** Yes, that is right. I would only qualify that by saying that whereas 25 and 27 are solely interpretive provisions, 28 has some kind of reinforcing and strengthening effect as well as interpretive, but I do not think section 28 creates a new right.

**Mr. Cordiano:** But it does refer to section 15, which bestows rights on individuals, which is a fundamental difference between those sections.

**Dr. Hogg:** Yes, I agree.

**Mr. Cordiano:** When you speak about sexual equality, tying this back to the whole question of a distinct society and using an interpretive clause and how that would impact on a section like 15, you have to ask yourself, does that have the same power in the charter, an interpretive clause, as does one that bestows rights? I think you are saying the answer to that is no.

**Dr. Hogg:** Yes, that is what I am saying.

**Mr. Chairman:** Yes, you are saying no.

**Mr. Cordiano:** That is right.

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**Mr. Chairman:** I am mindful of the clock. I have Mr. Elliot, Mr. Allen and Miss Roberts. I think I would go with those three and that would be the end.

**Mr. Allen:** As a supplementary on that, section 16 does not simply refer to sections 25 and 27. It also refers to "section 35 of the Constitution Act, 1982, or class 24 of section 91 of the Constitution Act, 1867." Do either of those other elements lead us in any other direction?

**Dr. Hogg:** No. Section 35 is the provision that guarantees aboriginal rights and technically it is not part of the charter. It was put in separately. Class 24 of section 91 is the federal authority to legislate in relation to Indians and lands reserved for the Indians, so it is the legislative authority over aboriginal rights, if you like. I suppose that section 35 and class 24 of section 91 are in there because they are linked with section 25.

**Mr. Allen:** Is it possible section 28 was not included because of your own observation earlier that this clause, unlike these ones, has a "notwithstanding" introduction to it?

**Dr. Hogg:** I do not know the reason section 28 was not included in section 16.

**Mr. Allen:** Section 28, on the face of it, though, would seem to be a stronger statement of rights than any of the other items.

**Dr. Hogg:** Yes. It clearly is a stronger statement and it may have been thought that it did

not need the added protection of explicit reference in section 16.

**Mr. Elliot:** I would like to thank you for a very informative afternoon, Dr. Hogg.

My question relates to the immigration aspect of the accord and beyond it perhaps just a bit. My understanding of the constitutional amendment proposed by Quebec is that it will be the only province with such a constitutional fact written into its part of the agreement with the federal government. The part of this that is news to me is that, with the exception of Ontario, British Columbia and Manitoba, if I have noted it correctly, I was not aware that the other six provinces already had an agreement with the federal government.

My question is, and this may be an extension that is not in order with respect to the accord, could you comment briefly on what the agreements might be that the other six provinces have with the federal government, and in particular how they might differ from what opportunities are given Quebec by its constitutional agreement?

**Dr. Hogg:** I am embarrassed to say I do not know the answer to that. It was also news to me when I discovered it. I discovered from the testimony before the federal legislative committee that six other provinces had agreements with the federal government. Like you, I had assumed that the Cullen-Couture agreement was the only one. I have not examined the others. I have seen the Cullen-Couture agreement. I have never seen the others and I do not know what they say or how they differ, nor do I have any idea whether the other provinces will also want to constitutionalize their agreements. I am sorry that I am not helpful on that at all.

**Mr. Elliot:** By way of supplementary, I would like to thank you for that information because I was really trying to be a little bit lazy here and not have to do the research myself with respect to the other six agreements. Perhaps we will do it together and if I get it first, I will give it to you.

**Dr. Hogg:** Thank you. I appreciate that.

**Miss Roberts:** My question deals with the Supreme Court of Canada, if I might ask Professor Hogg briefly. I believe you indicated in your discussion that someone from a territory could not be appointed to the Supreme Court of Canada. From my reading of it, and most likely I am incorrect, it would appear that as long as the person in the territory had practised and had met the qualification of section 101B, and then was admitted to a bar of a province, he could indeed

be appointed as long as he could convince that province to do so. It does not completely preclude them; it just means they have to go through another step.

**Dr. Hogg:** Yes. That is quite correct. If a person practising in the territories or a judge in the territories was also a member of the bar of a province, then he could get on to the list of the province of which he was a member of the bar and, in that way, become eligible for appointment. I think the person who is missed out altogether is the person who is only admitted to the bar of one of the territories and has not become admitted to the bar of a province.

Of course, I suppose it might also be said that it is not terribly realistic to think a province will put forward somebody who is practising elsewhere than in the province. You are quite right that probably many or perhaps nearly all of the lawyers practising in the territories are also members of the bar of some province and could, therefore, technically get on to a list.

**Mr. Allen:** Mr. Chairman, I know I have asked some questions already, but I really would like to have Dr. Hogg's reaction to some of these questions. Excuse me for interrupting.

**Mr. Chairman:** That is quite all right. Go ahead.

**Mr. Allen:** I have a couple of rather quick items. I was surprised to hear you say there is an agreement that there should be three members of the Supreme Court, by tradition, from Ontario. I knew there were to be three from the Civil Code background and that they were therefore normally likely to be from Quebec. Are there other apportionments on the Supreme Court that relate to other provinces?

**Mr. Hogg:** Yes, there are. The practice is that three judges should come from Quebec. That is in the Supreme Court Act now and will be in the Constitution when the accord is ratified. Then the other places are all allocated by convention. Three go to Ontario, two go to the four western provinces, and the remaining one goes to the four Atlantic provinces. The court right now exactly mirrors that distribution.

For example, if Mr. Justice La Forest were to retire, the assumption would be that he would be replaced from one of the four Atlantic provinces and therefore the federal government would have four provincial lists to examine in order to replace him. The matter is fairly strictly regulated, although, as I indicated earlier, it is not cut in granite; there can be changes.



**Mr. Allen:** With respect to national objectives—and it has been surprising we did not get into spending power more than we did this afternoon—you defined the language “national objectives” to mean simply to relate to the program in question. That is, if it was a national day care program, then the provincial program would have to conform to that intent in order to qualify for the money. Does your language also mean that if the federal government is to say it must be a nonprofit day care program, that becomes the national objective, or could one still establish a day care program but have it commercial and still qualify?

**Dr. Hogg:** I have struggled with that question myself and I do not think it is possible to give a categorical answer. I am fairly confident on the point that you started with. I am fairly confident that the only reasonable interpretation of the phrase “national objectives” is in relation to the national shared-cost program, so it would have to be the objectives of the program. As to how you distinguish between the objectives of the program and those aspects of the program which are incidental or means towards the objectives, I think it is difficult to give a clear answer.

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**Mr. Allen:** People have used the words “objectives and standards” as though they have meant different things. Do they mean different things to you in law with respect to this kind of a consideration?

**Dr. Hogg:** I am not sure, because I do not think we have used either “objectives” or “standards” in the Constitution before Meech Lake, so it is not easy to be sure whether there is a difference between the two terms or whether the word “standards” would help section 106A. I am inclined to think it would be just as difficult to deal with as the word “objectives.”

**Mr. Cordiano:** Professor Hogg, could you contemplate a situation where the federal government would be in a dispute with the province if that province had not met what it considered the national objectives? The courts would obviously have to rule on what is a national objective. But does the federal government not really have a little more force in this area because it is now being granted constitutionally some additional powers which it did not have and which were in question—I mean, it is still in question right now before the courts—because it is the federal government that is setting what will be deemed to be the national objective, whereas it was not doing that before constitutionally with any right?

**Dr. Hogg:** It seems to me it is probably the kind of thing that will get itself resolved by agreement without litigation. There has been very little litigation on the whole spending power in all the years that the federal-provincial financial arrangements have been in place. But it does seem to me that, in the ultimate, if a dispute developed with a province saying, “We are satisfying the national objectives; pay us our reasonable compensation,” and the federal government saying, “No, you are not achieving the national objectives and we will not pay you your reasonable compensation,” ultimately that would have to be resolved by the courts. I think the province could sue the federal government for reasonable compensation, the court would have to make a decision and the sort of problems that Dr. Allen raises would then have to be resolved by the court itself.

**Mr. Cordiano:** But as you point out here—I am looking at your book and in your remarks—clearly, the federal government has now been granted some additional rights constitutionally that it really did not have before in areas of provincial jurisdiction. Thus, some of the things the federal government was doing, as in the case you have pointed out, have been brought before the Supreme Court and it is anybody’s guess how the courts would rule on that. At least here there is a more definitive interpretation to what is going on than ever before. Is that a fair statement to make?

**Dr. Hogg:** Yes, that is true. But what the federal government has lost is that it does have to provide reasonable compensation to a province that fulfils the national objectives, so there has been some gain for the federal government in terms of the clarification of what was previously unclear, but there has also been some loss in terms of the obligation to provide reasonable compensation.

**Mr. Allen:** I am not sure that I want to draw you entirely into a large answer to the next question, because it gets into the whole issue of Mr. Trudeau’s objections to Meech Lake and that is a big issue in itself. But I am puzzled by what we have heard this morning and this afternoon when one looks, for example, at the Trudeau white paper of 1978 and the subsequent bill; the readiness to include the provinces in Supreme Court appointments and the willingness to amend the Senate rather dramatically; Mr. Trudeau’s own government’s practice and that of his predecessor, Mr. Pearson, with respect to shared-cost programs around the Canada pension

plan and governmental commitments around that vis-à-vis federal-provincial roles.

I have found it very difficult to fathom Mr. Trudeau's own objections to the statement around spending power and national-programs objectives in shared-cost programs, and I have been wondering whether I am missing something.

It seems to me that Meech Lake really consolidates in many ways what was the practice or hopes of those years and of that government, and I find it difficult, therefore, to understand the objection. I do not know whether you know something about this that I do not. I would be pleased to have your help with it.

**Dr. Hogg:** My reaction is exactly the same as yours, that when you trace each of the specifics of the Meech Lake accord back through the last 20-odd years of constitutional discussions, I think you can find the origins typically in matters that were either agreeable to the government of Prime Minister Trudeau or had actually been the subject of agreement in the Victoria charter, for example.

There is really nothing in there that is new or unexpected, it seems to me. So I was also surprised by the vehemence of Mr. Trudeau's objection to the specific points, because it seemed to me there was an answer to pretty much every point that he made in the practice of his own government or in ideas that his own government had obviously offered or considered sympathetically.

I suppose the one point I thought Mr. Trudeau could fairly make was to say, "I would not have given away all of these five matters without getting more in return." In other words, he might have been able to say: "Yes, each of these ideas was one that my government was sympathetic to, but we would not have given them all away at once. We would have got more in return." It seemed to me, reading Mr. Trudeau's testimony, that was really the only point he could fairly make and the specifics of his criticisms were, to my mind at least, not very cogent.

**Mr. Chairman:** One final, last supplementary.

**Mr. Offer:** Professor Hogg, with respect to the spending provision, you indicated earlier that it constitutes a clarification and I think you have indicated that it is, in fairness, not without controversy. I think you have also indicated just recently that there is a give-and-take by both the federal and the provincial governments. I am wondering whether, taking these matters into consideration, you can share with us your

thought whether this is a reasonable type of provision with respect to the spending provisions.

**Dr. Hogg:** I think it is entirely reasonable. You have to remember that section 106A applies only to programs that have been established in areas of exclusive provincial jurisdiction. It seems to me that it is perfectly reasonable to impose some restrictions on programs in areas of exclusive provincial jurisdiction. I notice, as Dr. Allen referred to just a minute ago, that it was the policy of the Trudeau government not to go forward with new shared-cost programs in areas of provincial jurisdiction without providing compensation to opting-out provinces. That was announced in a white paper.

In fact, the Trudeau government did not establish any new shared-cost programs that I can recall. So it seems to me that what section 106A is doing is constitutionalizing the kind of compromise that we would have come to anyway in the design of any given shared-cost program, given the strong claims of the provinces to autonomy in those areas which are their own areas of jurisdiction.

**Mr. Chairman:** Professor Hogg, you have been very good with your time. I think it is only fair that, perhaps for those who have been following along with us, I at least give your book, *Meech Lake Constitutional Accord Annotated*, a plug. It is available through Carswell in Toronto, Calgary and Vancouver, and I am sure your favourite local bookstore will have it.

**Dr. Hogg:** Are we on national television, Mr. Chairman?

**Mr. Chairman:** I do want to thank you very much for going through the entire agreement with us. It has been extremely helpful. I think the various things that we learned this morning and what we have reviewed with you this afternoon will help get us up to steam as we proceed through this week and the ensuing weeks of testimony. On behalf of the committee, I want to thank you very much for coming this afternoon.

**Dr. Hogg:** Thank you. I very much enjoyed the opportunity.

**Mr. Elliot:** I have an answer to the question that we did not have an answer for before. If I could share it with the committee, I think it would be meaningful at this point.

**Mr. Chairman:** We are glad that you do not have to do any more work.

**Mr. Elliot:** That is right. One of the people who addressed us this morning was Don Stevenson, who is the representative to Quebec. He



indicates to us that the other six agreements are with respect to guaranteed consultation relative to targets that have been established, that type of thing. The only two provinces, other than Quebec, that are thinking of constitutionalizing their agreements are Alberta and British Columbia at the present time.

**Dr. Hogg:** Thank you, Mr. Elliot. That is very helpful.

**Mr. Chairman:** Thank you very much. If there are no other matters before this committee, we will reconvene tomorrow morning here at 10 o'clock.

The committee adjourned at 4:20 p.m.

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**CONTENTS****Tuesday, February 2, 1988****SELECT COMMITTEE ON CONSTITUTIONAL REFORM****Chairman:** Beer, Charles (York North L)**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breagh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Substitution:**

McLean, Allan K. (Simcoe East PC) for Mr. Eves

**Also taking part:**

Polsinelli, Claudio (Yorkview L)

**Clerk:** Deller, Deborah**Staff:**

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:****From the Ministry of Intergovernmental Affairs:**

Cameron, Dr. David, Deputy Minister

Stevenson, Donald W., Ontario Representative to Quebec and the Federal Government

**Individual Presentation:**

Hogg, Dr. Peter, Professor, Osgoode Hall Law School, York University







No. C-2

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### Select Committee on Constitutional Reform

1987 Constitutional Accord



**First Session, 34th Parliament**

Wednesday, February 3, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## STANDING COMMITTEE ON CONSTITUTIONAL REFORM

**Wednesday, February 3, 1988**

The committee met at 10:08 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. I will call our session to order. Just before asking Professor Baines to make her presentation, I wonder if I could ask the clerk of the committee if she would please explain how to work the interpretation devices. Some of you are old hands at this, but there are some of us who could perhaps use some instruction. Mrs. Deller, would you explain how they work?

**Clerk of the Committee:** Simple.

**Mr. Harris:** What you do is just like what a stewardess does.

**Mr. Chairman:** Yes, right.

**Clerk of the Committee:** The dial is on channel 3 and it should not be; it should be on channel 2. The red button that slides across goes from left to right, and that is your volume. You just hook the little plastic piece around your ear, no problem. OK?

**Mr. Chairman:** Is everyone clear? Experimentation will probably be the test, I suspect.

**Clerk of the Committee:** If you find you have a lot of static or if it is not coming through—

**Mr. Harris:** That is for those who want French to English. What about those who also want English to French?

**Clerk of the Committee:** No, that is whatever, English to French or French to English.

**Mr. Harris:** All right.

**Mr. Chairman:** Thanks very much.

Our first guest this morning is Professor Beverley Baines of the faculty of law, Queen's University. Professor Baines, we are very pleased that you could join us this morning. We also thank you for making available copies of your submission, which will help us in dealing with the accord. I think with that, I will turn the floor over to you. Please go ahead.

### BEVERLEY BAINES

**Ms. Baines:** Thank you, Mr. Chairman. Thank you for inviting me to speak to you. I understand that you had a long day yesterday, and I guess you have a few more long days to

come. I was particularly interested last night as I read Professor Hogg's testimony. I think when you hear what I have to say today, you will find that I have a strong interest in reading the testimony of legislative committees on issues that deal with women. I read Professor Hogg's two-and-a-half-hour testimony and I was very interested to see that you raised a lot of questions about sex equality, because that is basically what I am going to talk about today: the issue of women's charter-based equality rights in the Meech Lake accord.

I am going to read to you because I have prepared a text which I think makes the points I would like to make. It may take me some time. I apologize. I understand that people like to intervene and ask questions, but I am more than willing to take questions when I have read what I have to say. Particularly if it is not clear, I would welcome any questions that could clarify it.

I would first of all like to provide you with some background information about myself because none of you has met me, or at least to my knowledge none of you has met me. When, in 1980, the federal government was in the process of drafting the charter, I was one of several women lawyers from whom the Canadian Advisory Council on the Status of Women sought advice about strengthening the sex equality provision, what is now section 15 of the charter. In 1981, I was one of many Canadian women mobilized by the Ad Hoc Committee of Canadian Women on the Constitution. As you are undoubtedly aware, the ad hoc committee was one of the women's groups responsible for the creation of section 28 of the charter.

Last summer I appeared with the National Association of Women and the Law before the federal committee on the Meech Lake accord. I also wrote a background paper on women's equality rights and the Meech Lake accord for the Canadian Advisory Council on the Status of Women. In all of these activities, I have always been encouraged by the number of women who have devoted much time and energy to the cause of women's equality. In other words, I am by no means unique, nor do I claim to be.

More recently, I have written an article analysing the report of the federal committee on the Meech Lake accord. This article is supposed



to be published in the Queen's Quarterly, which is a scholarly publication that comes out of Queen's University; I believe it is due for publication in another three weeks. In this article, I concentrated on the portion of the federal committee report that concerns the impact of the accord on women's charter-based equality rights.

My research involved comparing the arguments which the report attributed to women who had appeared as witnesses on behalf of the national women's organizations with the testimony which these women actually gave. The women's testimony was reported in the committee's minutes, or their Hansard, making this comparative research perfectly feasible. When I compared the minutes and the report, it became obvious that the members of the federal committee had not heard—and that is the politest way I can think of putting it—the testimony of the women who appeared before them to give evidence on this issue.

More specifically, in its report the federal committee refuted three main arguments about the impact of the accord on women's charter-based equality rights. These arguments were: first, that the "distinct society" clause should not be entrenched; second, that gender equality rights should be treated as a special case; and third, that gender equality rights should be given a guarantee of automatic paramountcy.

But as the committee minutes reveal, the women who gave evidence on behalf of the national women's organizations never made any of these arguments. Let me be specific. The women never argued that the "distinct society" clause should not be entrenched; the women never argued that gender equality rights should be treated as a special case; the women never argued that gender equality rights should be given a guarantee of automatic paramountcy. The arguments which the women actually made were never addressed in the federal committee's report.

I do understand, by the way, from Professor Hogg's testimony, that you have been given a copy of the federal committee's report, so you can indeed verify my research if you choose.

The irony of the committee's failure to hear women's voices is that it happened in a context in which the committee was charged with the task of examining the linguistic and cultural implications of the accord.

I would be less than honest if I did not admit that my research on the federal committee report has left me sceptical about the legislative

committee process. However, you are a different committee, differently constituted, and I want to credit you with open minds and, perhaps more important, a keen sense of hearing.

Here is how I propose to proceed. I am going to concentrate on the sections of the accord that relate directly to women's charter-based equality rights. That means I will concentrate on two sections of the accord, section 1 and 16. Section 1 contains the linguistic duality and "distinct society" provisions. I did notice a tendency yesterday to ignore the linguistic duality provision, but it is as important as the "distinct society" provision in section 1. Section 16 concerns aboriginal rights and the multicultural heritage of Canadians. Of these two sections, section 16 is more important to my argument.

One final preliminary point: since section 1 of the accord is also known as section 2 of the Constitution Act, 1867, from now on I will refer to it as section 2 to make the point that I welcome Quebec's participation in the Constitution.

Although I am not going to refer to the remaining sections of the accord, I would like to make it clear that women's groups have legitimate concerns about the provisions that refer to Senate appointments, to immigration agreements, to Supreme Court of Canada appointments, to the spending power, to the constitutional amending process and to first ministers' conferences. Those concerns were clearly expressed in the briefs and testimony given to the federal committee and, I hope, will be clearly expressed to you.

For example, the National Association of Women and the Law made a recommendation to the federal committee concerning appointments to the Supreme Court of Canada. It is perfectly appropriate for a women's legal organization to do that. The National Association of Women and the Law recommended, both in their written brief and in oral testimony before the federal committee, that national women's groups be given the right, in addition to the provinces, to recommend names for vacancies which occur in the Supreme Court of Canada.

In passing, I am somewhat surprised to note that in his recently published booklet, the Meech Lake Constitutional Accord Annotated, Professor Hogg failed to make any reference to this well-documented recommendation by the National Association of Women and the Law, although he did refer expressly to the recommendations about Supreme Court of Canada appointments that had emanated from the Canadian Bar

Association and the Canadian Association of Law Teachers.

However, much as I might like to continue to refer to the legitimate concerns raised by the other provisions of the accord, I intend to confine my remarks to sections 2 and 16 because there is more than enough to say about those sections. Put simply, my research suggests that section 2 and section 16 of the accord put women's charter-based equality rights in jeopardy. More specifically, given the existence of sections 2 and 16 of the accord, the source of the problem is the absence of any reference in the accord to women's charter-based equality rights.

Initially, I thought this omission was due to yet another oversight on the part of the first ministers. I remembered that their predecessors had forgotten about the existence of section 28 of the charter when they were negotiating the charter's override clause in November 1981. But I no longer believe that the first ministers forgot about women's charter-based equality rights when they were negotiating the Meech Lake accord last summer.

In the first place, we know the first ministers did consider the question of whether to exempt the whole charter. We know this from the testimony given to the federal Meech Lake committee and recorded in the minutes of the last day of the hearing by Norman Spector, who is the secretary to the cabinet for federal-provincial relations. Mr. Spector was present in the room when the first ministers were negotiating the terms of the accord on the night of June 2 to 3.

According to his testimony, after the first ministers had agreed to include the aboriginal and multicultural provisions in the accord in section 16, "the issue came up of whether the entire charter was exempted." As Mr. Spector put it, "That option was rejected, because it was not acceptable and it was a deal-breaker." So we know that the first ministers were not prepared to exempt the whole charter, although they were prepared to exempt the aboriginal and multicultural provisions.

No evidence was given to the federal committee about any specific discussion of women's charter-based equality rights, but rampant rumour has it that there was such a discussion. The rumour is that the first ministers decided to protect the aboriginal peoples and multiculturalism, but not women, for—and here I draw again on Mr. Spector's testimony to the federal committee—"political reasons."

Because Mr. Spector did not elaborate, it is possible that by "political reasons" they meant to

suggest that women should have lobbied for inclusion in the accord before the Ottawa meeting. If so, there is a major problem with that suggestion. Unlike the aboriginal and multicultural lobbies, the women's lobby was not represented by any concerned insiders during the accord negotiations. Thus women were never warned when the first ministers decided to change the terms of the accord—I am referring specifically to deciding to create section 16—between their Meech Lake and Ottawa meetings, so the women's lobby had no way of knowing that their efforts were required before the Ottawa meeting.

Alternatively, it is also possible that the phrase "political reasons" was meant to suggest that women had already achieved equality, perhaps to suggest that we were just being uppity in demanding more. If so, then those who subscribe to this suggestion should look around them. Were they to read the fact sheets issued by the Ontario women's directorate, they would have to acknowledge that women are a long way from achieving gender equality.

These fact sheets show that women are ghettoized in employment. In 1984, the fact sheets show that 59.5 per cent of Canadian women in the labour force were concentrated in clerical, sales and service sector jobs which were generally low paid. By contrast, only 26 per cent of men were employed in these occupations. These fact sheets also show the income differentials between women and men. In 1982, women working full time in Canada earned 62.2 per cent of what men earned. As well, these fact sheets show other labour force and income differentials.

For example, in Canada, 64 per cent of women report that they suffer work interruptions because of their parenting and marriage responsibilities, while less than one per cent of men report that their work suffers interruptions because of similar obligations. Licensed child care in centres and family homes provides 171,654 spaces in Canada. If a licensed space was available for each child of working parents, it is estimated that 1,950,000 spaces would be needed.

Women in the labour force perform twice as many hours of family and home care duties as men. Only 39 per cent of working women as compared to 54 per cent of working men are covered by a private pension plan. Moreover, the fact sheets issued by the women's directorate reveal inequities in the family area. For example, women comprise 83 per cent of single-parent families in Ontario. Divorced men experience an



average 42 per cent rise in their standard of living in the first year after divorce, while divorced women and their children experience a 73 per cent decline. Forty-three per cent of single-parent female-headed families have incomes below the poverty line. Less than 14 per cent of single-parent male-headed families are below the poverty line.

I have noted those facts. I think probably many of you are aware of them because they are on the Ontario women's directorate fact sheets, but I think the exemplify how women do not yet have equality in Canada or in Ontario.

Anyone who has thought about gender equality would also have to recognize that as long as women are so vulnerable to sexual assault, wife battering, sexual harassment and pornographic degradation, there is no question of equality being achieved or even approximated. Under these circumstances, how could anyone imagine that we have achieved sex equality?

Perhaps it is because the charter provides for sex equality; but merely because the law provides for equality—even if it is a constitutional law such as the charter—does not make life as we must live it an egalitarian experience for women.

When I try to understand the "political reasons" that led the first ministers to protect the rights of aboriginal and multicultural peoples in the accord, while at the same time denying women that protection, here is what I conclude: I conclude that what started as the Quebec round of constitutional negotiations became at that moment of denial the men's round. There may have been one or even two women in the room with the first ministers and their key advisers. That does not make the decision any less gendered. When an overwhelming preponderance of the decision-makers are both powerful and male, and those powerful male decision-makers decide to deny women the protection already accorded to aboriginal and multicultural peoples, then that decision is gendered and the Meech Lake accord is properly referred to as the men's round.

Now I would like to move from the context that surrounded the exclusion of women's charter-based equality rights to the legal arguments that support the inclusion of these rights in the accord. There are two main issues which must be addressed in order to support the conclusion that women's charter-based rights must be included in the accord. The first of these legal issues involves explaining the relationship between the accord and the Charter of Rights. More specifically, this first issue involves an explanation of the relationship between section

2, that is, the linguistic duality and "distinct society" provisions of the accord, and sections 15 and 28, the sex equality provisions of the charter. The second legal issue involves explaining the meaning of section 16, the aboriginal and multicultural provision of the accord.

Turning to the first issue, there are four possible ways of explaining the relationship between the accord and the charter. (1) The charter may override the accord; (2) the charter may not apply to the accord; (3) the accord may override the charter; (4) the interests of the accord and of the charter may balance each other out, making the outcome of any particular controversy dependent on the particular circumstances of that controversy. I will examine each of these explanations in turn. In doing so, I would like to note that I am not addressing the question of which of these relationships should prevail. Rather, my objective is to explain which relationship does prevail. In order to research this question, I relied mainly, although not entirely, on the testimony of the legal academics and lawyers who appeared before the federal committee and whose evidence was recorded in the committee minutes.

Interestingly enough, when I did my research I could not find anyone who argued that the charter overrode the linguistic duality and "distinct society" provisions of the accord. However, Professor Hogg, who did not appear before the federal committee, has stated in his new booklet that "s. 2...is subordinate to the charter." Although he might be interpreted as meaning that the charter overrides the accord, I rather doubt that he would approve of that interpretation because it would not be consistent with his later argument about reading section 2 of the accord with section 1 of the charter to, as he put it, "expand the power of Parliament or a legislature to derogate from the charter." Accordingly, I think it is fairly safe to conclude that no one argues that the charter overrides the accord.

I want to take the next two explanations of the relationship between the accord and the charter—that is, the explanation that the charter may not apply to the accord and the explanation that the accord overrides the charter—together, for reasons which will become apparent in a moment. As I researched the minutes of the federal committee, I found that all the women academics and lawyers who appeared before that committee on behalf of the national women's organizations raised the issue of whether the charter applied to section 2 of the accord. Moreover, these women also went on to argue that the charter might not

apply to section 2 of the accord, given the decision of the Supreme Court of Canada in the Ontario separate school funding case.

In that case, the court found that section 93, the separate school education provision of the Constitution Act, 1867, was immune from invalidation by the charter. If section 93 was immune from charter invalidation, the women reasoned, might not the linguistic duality and "distinct society" provisions also be immune from charter invalidation?

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One or two of the men who appeared before the federal committee agreed that the charter might not apply to section 2 of the accord because of the decision in the Ontario separate school funding case, but most of the male academics and lawyers argued that the women were wrong; and when they did, these men also asserted that the accord did not override the charter. Indeed, Professor Hogg has made the same assertion in his new booklet.

At first I found the men's assertion about the accord not overriding the charter somewhat peculiar, given that I could not find anyone who was arguing that the accord did override the charter. However, I have recently come to the conclusion that when the men argue that the accord does not override the charter, they are actually addressing the women's argument about the charter not applying to section 2 of the accord. In other words, the men have collapsed the second and third explanations of the relationship between the charter and the accord—namely, the explanation that the charter may not apply to the accord and the explanation that the accord overrides the charter—into their own uniquely negative assertion about the accord not overriding the charter.

The important question is not whether these two explanations should or should not be collapsed, but rather whether the men can sustain their assertion that the accord does not override the charter. Clearly, they cannot sustain that assertion without explaining the decision of the Supreme Court of Canada in the Ontario separate school funding case. Interestingly enough, when these men explain the decision in the Ontario separate school funding case, they offer more than one interpretation of that case. However, mostly they offer either the interpretation provided by Professor Lederman in his article in the *Financial Post* or the interpretation provided by Professor Hogg in his new booklet.

According to Professor Lederman's interpretation, the decision in the Ontario separate school

funding case should be restricted to the precise laws and facts with which that case was concerned. Since the decision concerns section 93 of the Constitution Act, 1867, this would mean that only section 93 would be immune from charter invalidation. Professor Hogg's interpretation is only marginally less restrictive than Professor Lederman's. Professor Hogg would restrict immunity from charter invalidation to other constitutional provisions that are inherently discriminatory.

Needless to say, Professor Hogg does not believe that the linguistic duality and "distinct society" provisions are inherently discriminatory, and he says this in his new booklet. As well, I should note that Professor Hogg shares his restrictive interpretation of the decision in the Ontario separate school funding case with the majority of members of the federal Meech Lake committee. In the federal committee report, this interpretation was attributed in turn to the minority judgement of the Honourable Mr. Justice Estey in the Ontario separate school funding case.

Therein lies the problem with both of these interpretations. Both do violence to the majority judgement in the Ontario separate school funding case. That majority judgement was written by Madam Justice Wilson and concurred in by the Chief Justice and Justices McIntyre and La Forest. Since Madam Justice Wilson does not write about inherently discriminatory legislation and since she is writing the majority judgement, arguments about restricting the decision to other inherently discriminatory laws are not made from a position of strength.

Moreover, Madam Justice Wilson also provided a full and complete answer to those who would subscribe to Professor Lederman's very restrictive interpretation of her decision when she wrote, "It was never intended, in my opinion, that the charter could be used to invalidate other provisions of the Constitution, particularly a provision such as section 93 which represented a fundamental part of the Confederation compromise."

According to Madam Justice Wilson, therefore, the test of whether a constitutional provision is immune from charter invalidation is whether the provision represents a fundamental part of the Confederation compromise. Moreover, it would appear that her test could be applied to the linguistic duality and "distinct society" provisions of the accord. The very fact that the first ministers opted to lodge the linguistic duality and "distinct society" provi-



sions back in the historic Constitution Act, 1867, would suggest that these provisions could qualify as “a fundamental part of the Confederation compromise.” Indeed, there seems to be no other logical reason for opting to lodge these particular provisions in the 1867 Constitution Act and thereby to rewrite the history of the Canadian Constitution in the process.

If I am right in my interpretation of and reliance on Madam Justice Wilson’s decision in the Ontario separate school funding case, then it is impossible to argue conclusively, as the men try to do, that the accord does not override the charter. But it is possible to sustain the women’s argument that the charter may not apply to the accord, given Madam Justice Wilson’s decision. The women’s argument only needs to be persuasive and not conclusive in order to sustain the conclusion that the accord puts women’s charter-based equality rights at risk.

Let me move on to the final explanation of the relationship between the accord and the charter. According to this explanation, the relationship is one of a balancing of the interests at stake in each particular controversy. Many people advance this argument, mostly by reading section 2 of the accord with section 1 of the charter, as Professor Hogg suggested to you yesterday. Now this explanation makes it difficult, if not impossible, to predict the outcome of any particular confrontation between a section 15 sex equality claim and a section 1, read with section 2, linguistic duality or “distinct society” limitation. What is predictable is that having to balance our charter interests against the limitations of the accord in each particular controversy means more money for lawyers and more problems for women claimants.

Moreover, what everyone seems to forget—I am pleased to note that Professor Hogg did not forget it yesterday—is that in a conventional section 15 sex equality case, the balancing does not end by relating sections 15 and 1 of the charter. Rather, in a conventional sex equality case, even if the court decides to impose a section 1 limitation, there is still one further step which must be taken. The court must consider whether section 28, that is the second sex equality provision in the charter, has a countervailing effect on section 1.

In other words, because section 28 begins with a “notwithstanding” clause, it may have the effect of countering the impact of the section 1 limitation. Although there is not enough jurisprudence on section 28 to know with certainty whether it has this impact, it is clear from the

history of the creation of section 28 that its intended function was to provide relief against section 1.

The problem which the accord poses relative to section 28 is not that we do not know with certainty how section 28 will be interpreted. Clearly, we do not. I have looked at the jurisprudence on section 28 and I can speak about it later if you would like me to. We created section 28—indeed, I often think of section 28 as a women’s equality provision because it was women who lobbied for its creation—and we will litigate our interpretation of section 28 as the appropriate cases arise.

In other words, the members of the federal Meech Lake committee were completely off base when they concluded that our problems lay with the charter and not with the accord. We made no such argument about the charter sex equality provisions. Indeed, section 15 of the charter has been in effect for less than three years and the Supreme Court of Canada has not yet even rendered its first decision on the sex equality provisions. The closest that the Supreme Court of Canada has come to deciding a charter-based sex equality case happened in the Blainey case when the court simply refused leave to appeal, thereby upholding the decision of the Ontario Court of Appeal to the effect that subsection 19(2) of the Ontario Human Rights Code was invalid.

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In so doing, the court did not have to give any reasons for its decision; and in so doing, the Supreme Court of Canada did not tell us the meaning of the sex equality provisions in the charter. We do not know for sure whether the court would adopt the Ontario Court of Appeal’s meaning, and I suggest that the Ontario Court of Appeal was not exactly clear in delineating the meaning of the sex equality provisions in the Blainey case, which is not to take away from the outcome. The outcome is just fine, in my opinion.

It is not the charter but the accord that poses a major problem in relation to section 28. It is the accord, and more particularly section 16 of the accord, that precludes the effective operation of section 28 in the context of what would otherwise be a balancing of the interests of the charter and the accord. Accordingly, this brings me to the second legal issue, that of the meaning that is to be attributed to section 16 of the accord. As you are aware, section 16 provides that nothing in the linguistic duality and “distinct society” provisions affects the charter-based and Constitution-based rights—and I use the word “rights”

advisedly there—of the aboriginal peoples and the charter-based rights of the multicultural peoples.

Neither the aboriginal nor the multicultural peoples find section 16 particularly satisfying; from the perspective of women, however, section 16 is downright dangerous. By naming the aboriginal and multicultural peoples with such specificity—and this is done by referring to the specific sections of the charter and the Constitution acts that cover the aboriginal and multicultural peoples; which brings to mind one of the questions that was raised yesterday to Professor Hogg about constitutions being drafted in general language.

That is true. The accord is drafted in general language, except for section 16 which very specifically names four sections of the charter and the Constitution acts that are not affected by section 2 of the accord. By naming those groups with such specificity, section 16 leaves open the very real possibility of a judicial decision that could preclude making its protection available to any unnamed groups, such as women. In other words, section 16 creates a hierarchy of rights that did not exist under the charter. In so doing, section 16, in effect, nullifies any impact that a strengthened interpretation of section 28 might give us in the balancing of the accord and the charter.

Moreover, section 16 creates this hierarchy of rights among aboriginal, multicultural, distinct society, linguistic duality and women irrationally. Significantly, the members of the federal Meech Lake committee acknowledged the irrationality of the hierarchy of rights created by section 16 when they reported that, "Various distinguished constitutional experts...had great difficulty in providing a legal rationalization as to why certain sections are included in section 16 and why others are left out."

I should note that the federal report also rejected the argument that section 16 could be explained as an interpretation clause that did not cover subsections involving rights. They did indeed acknowledge, as I think Professor Hogg did yesterday, that the aboriginal peoples and the multicultural peoples would be quite distressed to learn that some people were trying to suggest their charter provisions and their constitutional provisions did not give them any rights.

That being said, to the extent that any explanation of the groups included in section 16 has been forthcoming, it has issued from the federal Minister of State (Federal-Provincial Relations) when he said in his testimony before the federal committee that "the various refer-

ences to aboriginal peoples relate to collective rights" and also that "because multiculturalism and native peoples related to groups with a cultural aspect, it was thought appropriate to put in that nonderogation clause," that nonderogation clause being section 16.

However, women can accommodate the federal minister's explanation with no difficulty. Women can demonstrate that they share collective or group rights by pointing to cases such as the CN affirmative action case, which was decided recently by the Supreme Court of Canada and held that women as a group were disadvantaged by CN's hiring practices, hence requiring CN to impose an affirmative action policy.

Also, there is the Federation of Women Teachers' Associations of Ontario case, which has only been heard and decided at the trial level thus far and is being litigated in the Ontario court system, wherein indeed the court has decided that a women's teachers' organization is valid under the Constitution.

Women can also point to scholarly writing such as that by psychologist Carol Gilligan and sociologist Jessie Bernard to make the case for a women's culture. Thus, women can claim that they share the collective and cultural characteristics that apparently led to the inclusion of the aboriginal and the multicultural peoples in section 16.

In passing, I should note that it is this claim of similarity to the aboriginal and multicultural peoples that refutes the federal Meech Lake committee's allegation that women were making a case for special treatment. We claimed similarity, not specialness.

In fact, the case for special treatment was forced upon us when the federal committee persisted in demanding examples showing that the linguistic duality and "distinct society" provisions could have a negative effect on women's charter-based equality rights. No such demands were made of the aboriginal and multicultural peoples before they were included in section 16 of the accord, nor should such demands have been made of women after we demonstrated that in this context our collective and cultural needs are analogous to those of the aboriginal and multicultural peoples.

With hindsight, I can say that we were foolish to provide the examples which the federal committee demanded; and yet, provide them we did, copiously. The National Association of Women and the Law provided examples in the areas of population control, reproduction, paren-



tal benefits, educational and economic opportunities and subsidized housing. LEAF, that is, the Women's Legal Education and Action Fund, provided examples involving abortion, education and employment. The National Action Committee on the Status of Women provided a very powerful example in the area of immigration. The Ad Hoc Committee of Canadian Women on the Constitution provided the legal opinion of Mary Eberts and John Laskin containing examples involving affirmative action, day care, communal land holding, birth control and spousal consent provisions in the Ontario Family Law Act.

Even now, I could draw on the recent Morgentaler decision to suggest yet another example involving possible federal legislation that might adopt a trimester-based approach to abortion. I do not advocate that approach, I do not advocate federal legislation in this area, but I could foresee the possibility and it is not, I suspect, that remote a possibility. Were the federal government to react to the Morgentaler decision by enacting trimester-based legislation and were Quebec to adopt either a more liberal—as is more likely, given Quebec's record on the abortion issue—or alternatively a more conservative approach to trimesterization, then Ontario would feel the impact, either because Ontario women might resort to the more liberal facilities in Quebec in one scenario, or alternatively because Quebec women might resort to the less conservative facilities in Ontario in the second scenario.

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My point is that there are many examples of the potential for conflict between the accord and women's charter-based equality rights. Those examples are not limited to Quebec, although I note that in your questioning yesterday you and Professor Hogg appeared to limit your examples to Quebec. Any provincial government—and Professor Hogg did note this—or the federal government could pass legislation pertaining to the linguistic duality provision. As he went on to say, it is not beyond the realm of possibility that a government other than Quebec might try to avail itself of the "distinct society" provision despite the explicit wording of the provision, as Professor Hogg noted, by arguing inferentially that if Quebec is a distinct society, then it must be distinct from some other distinct society; namely, the other government that is trying to pass the legislation under that provision.

I am not advocating such an extension of the "distinct society" provision. I simply point out,

as Professor Hogg did yesterday, that such claims would be possible. I particularly think it might be possible, for example, in the context of the abortion issue right now and British Columbia's position on therapeutic abortion committees and its failing to fund abortions. I do not want to advocate this for BC, but I think it is possible.

Now I want to report to you that the members of the federal Meech Lake committee dismissed all of our examples as hypothetical possibilities. I ask you, what other kind of examples could we have offered? We all know that most governments tried to clean up their legislation during the three-year hiatus between the coming into effect of the charter and the coming into effect of section 15 of the charter. You had varying degrees of success. But we also know that the future may bring in egalitarian legislation, particularly in the realms of population control, reproduction and affirmative action; yet the federal committee would not have us take preventive steps now because we could only hypothesize or theorize about the future.

Moreover, there was a certain inconsistency in the federal committee's report with respect to who could hypothesize about the future. According to the committee, women could not hypothesize about future possible conflicts; but when Professor Hogg did so, he was quoted with approval. All of this leads me to take the position that exemplification of possible conflicts is irrelevant in this context. What is relevant is that women's charter-based equality rights are analogous to those of the other groups—the aboriginal and multicultural peoples—included in section 16.

This brings me to my final argument about section 16. Professor Lederman has asserted in his Financial Post article that "section 16 is superfluous." Of this assertion, I have written in a subsequent Financial Post article, and I will quote myself, if I may:

"No court has so ruled. Indeed the courts have strenuously resisted redundancy arguments, at least in the context of the general equality rights section—section 15—of the charter. There the question has been whether the 'without discrimination' phrase is redundant, given that it is preceded by various 'equality' phrases. Although the Supreme Court of Canada has yet to rule on this question, at least four courts of appeal—in various provinces—"have expended considerable effort and verbiage on it. Surely we could expect that at least as much effort might be expended on a whole section, namely section 16,

of the accord. I do not think the courts will find section 16 superfluous."

To Professor Hogg, who asserts that section 16 is, and I quote from his booklet, "a cautionary provision designed to reassure native peoples and other ethnic, linguistic or cultural communities that the recognition of linguistic duality and Quebec's distinct society is not inconsistent with the protection of other distinct communities in Canada," my response is to state categorically that the historic and contemporary treatment of Canadian women mandates the same "cautionary" approach.

My legal arguments now made, what do I recommend?

First, let me review the range of recommendations that were made to the federal committee on this issue. The National Action Committee on the Status of Women recommended that section 28 of the charter be included in section 16 of the accord. They noted clearly that it was a compromise which they as a national umbrella organization had achieved by consulting all of their constituencies. The National Association of Women and the Law, which also consulted its members from across Canada, recommended that the sex equality rights in sections 15 and 28 of the charter be included in section 16 of the accord.

The Womens' Legal Education and Action Fund recommended that sections 15 and 28 of the charter be included in section 16 of the accord. The Canadian Advisory Council on the Status of Women recommended that the whole charter be inserted as an interpretation clause in section 2 of the accord; and in the paper that I wrote for the Canadian Advisory Council on the Status of Women, I provided background research to support that recommendation.

What all of these recommendations had in common was that section 28 be included in the accord. I note in passing that the *Fédération des femmes du Québec*, the largest women's organization in Quebec, testified before the federal Meech Lake committee that it would not oppose the inclusion of section 28 in section 16 of the accord.

My recommendation is therefore that the starting point must be the inclusion of section 28 in the accord. However, I find it difficult to stop with the inclusion of section 28, because I have researched the recent section 28 jurisprudence only to find that the courts consistently read section 28 with another section of the charter. Indeed, we have an Ontario Court of Appeal decision in a case called *Lucas and Neely*, in

which the Ontario Court of Appeal states that section 28 must be read with other sections of the charter.

I should note to you that section 28 does not necessarily have to be read with section 15 of the charter. There are other court decisions indicating that section 28 could be read with any other provision of the charter.

So if caution is the key to the accord, and Professor Hogg's analysis of section 16 suggests that it is, then we must include not only section 28 but also the rest of the charter. That said, I realize that the idea of including the whole charter in the accord has met with quite a range of responses, from Mr. Spector's aforementioned and pessimistic "deal-breaker" reference to the more progressive statement by the Quebec Minister of Intergovernmental Relations at Mont Gabriel in May 1986, to the effect that, and I quote the minister, "the Charter of Rights and Freedoms...is, on the whole, a document which we, as Quebecers and Canadians, can be proud of." There would seem to be some question as to which governments do not want the charter included in the accord. It certainly is not clear to me that the Quebec government is the problem.

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I have one final recommendation for the members of this committee. You are just beginning to hear the complex and controversial legal arguments that will continue to be advanced on this matter. Whether you are a lawyer or even a constitutional lawyer, or neither, there will be no denying the complexity and the controversiality of the legal arguments that you will hear. So, if you find that you can hear but not resolve the argument that the accord puts women's charter-based equality rights at risk, you have an honourable alternative to recommending or refusing to recommend a change in the accord.

You could recommend that the Ontario government direct a reference case to the courts to resolve the question, which is really a judicial question anyway, of whether the accord puts women's charter-based equality rights at risk. I would be delighted to have a higher court ruling that says I am wrong. I would also be surprised. I am willing to have that happen before the accord becomes constitutional law in Canada. Afterwards, there will be too much harm that could be caused.

There is certainly recent precedent for directing such a reference case. The precedent exists in the form of the constitutional reference case of 1981, when three provincial governments were



unsure of the rights of the other governments to put the charter into effect.

There is also a more poignant historical precedent for women in the context of the reference case on behalf of women that occurred in 1928, the "persons" case, when the Supreme Court of Canada ruled that women were not persons for purpose of appointment to the Senate, but the then highest court of appeal, the judicial committee of the British Privy Council, ruled that women were persons, to our everlasting delight.

Moreover, there is some indication that at least one other government is at the moment taking seriously the possibility of directing a reference on this matter to the courts. I only advocate the reference case if you find that you cannot resolve to your satisfaction the question of whether the accord puts women's charter-based equality rights at risk. If you feel that we are persuasive in making that argument, then please make a recommendation for changing the accord.

**Mr. Chairman:** Thank you very much, professor. That was a very thorough paper and we are indebted to you for spending, clearly, the time and patience in putting it together. I think you raise a number of fundamental issues. We will now try, through some questions, to clarify some points in our own mind.

I wonder if I could exercise the prerogative of the chair and lead off. I want to be very clear on one point you made. With respect to women outside Quebec, you are arguing that while women in Quebec would be most directly and particularly affected, in your view there are a number of matters whereby whatever might happen or whatever interpretation might be given by the court, in point of fact the accord as it now stands could affect in a negative way women throughout the country in terms of different kinds of programs that might be developed. Is that a fair statement?

**Ms. Baines:** The major point of my argument would be to make an argument for women outside of Quebec. I personally believe that the women in Quebec can make their own arguments with respect to the Quebec government. Indeed, when they appeared in front of the federal committee, they were very clear about the good relationship they had with the politicians in Quebec. I did not note the anglophone women making the same argument.

However, speaking as a woman outside of Quebec, I am speaking basically about the concerns that we outside of Quebec would raise about arguments that could be made under the

linguistic duality clause and also under the "distinct society" provision, should we be in the position where a government outside Quebec tried to rely on it or a government outside Quebec tried to refuse our request for equality treatment, such as in the abortion example, by saying, "Of course, Quebec can be more liberal, but we in Ontario cannot because we do not have that right to do so under the 'distinct society' clause."

I would not presume for a moment to speak for Quebec women.

**Mr. Chairman:** I was not trying to suggest that you were. I just wanted to be clear that one of the concerns here is that this accord would have the potential to affect all women in Canada.

**Ms. Baines:** Absolutely.

**Mr. Chairman:** I wanted to be clear on that point.

**Ms. Baines:** Absolutely. We agree.

**Mr. Cordiano:** Thank you, Professor Baines. You certainly have raised a number of complex questions and issues.

I am neither a lawyer nor a constitutional lawyer so I will attempt to have you clarify some points, if you will, for me. What I am interested in is when you were talking about multicultural peoples, you said on page 8 of your brief, "that led the first ministers to protect the rights of aboriginal and multicultural peoples." I recall you also said, "I use the word 'rights' advisedly," that is, the rights of multicultural peoples. Can you elaborate on what you meant by that and why you said you used the term advisedly?

**Ms. Baines:** I said I would use the term advisedly in the context of the aboriginal peoples. I was referring specifically to section 25 of the charter, section 35 of the Constitution Act, 1982 and subsection 91(24) of the Constitution Act, 1867. I would say very specifically that those people feel that they have rights from those three sections.

The question about the section that the multicultural peoples rely on is a question that is open to more interpretation, if you will. The clause itself has the word "interpreted" in it, so it would appear that it could be read as an interpretation clause and some challenge could be made to the question of whether it is a rights-bearing clause.

I think, though, if you ask the multicultural peoples themselves, in other words those people who would rely on section 27 of the charter, you would find them being quite concerned and surprised if you said to them, "That section does not give you any rights." I think what it does is

give them rights in connection with the specific groups that are mentioned in section 15 of the charter.

**Mr. Cordiano:** What is your definition of multicultural peoples?

**Ms. Baines:** That is a hard one to answer. I think that others with more background on that question than I have tried to answer it. I would prefer to refer you to a book that has come out called *Multiculturalism and the Charter: A Legal Perspective*, where studies have been made and information has been produced on that particular issue.

I think there are many categories that could be included in it, but at minimum it would incorporate some of the categories in section 15, including, for example, race and national or ethnic origin. What are the other categories? It might include a religious classification. I am thinking now in terms of the provisions of section 15, and those are the categories that I would include in section 27.

**Mr. Cordiano:** I would just venture to say that, as politicians, we certainly make mention or use of the fact that we have a multicultural society. Certainly, for some period of time anyway in our country, we generally have had an agreement on what, more or less, multiculturalism means to people. I think we are approaching the view—and have for a number of years anyway, in my opinion—that multiculturalism implies that all Canadians come from some background or heritage.

**1110**

In fact, when I look at section 27 of the charter, the words are very clear. It refers to the “preservation and enhancement of the multicultural heritage of Canadians.” I would take that to mean all Canadians. Therefore, I would think in that section all Canadians are included. I do not know about the section with reference to it being an interpretive clause or a rights-bearing clause. I am not going to ask you about that. I will leave that to the legal experts to decide, but I think there is some merit in saying that all Canadians are included in that section. Would that be correct to say, in your opinion?

**Ms. Baines:** Yes, it would.

**Mr. Allen:** I would like to express my appreciation to Professor Baines for taking us through our first really close study of some particular aspect of the accord as it relates to the charter in particular. She has of course raised a great many questions that many of us are going to want to turn over in our minds for some time as

we go through this exercise, because I do not think the attempt to distil a response at this point in time is very easy at all.

Certainly the list of concerns that you raised with respect to the present condition of women in Canada and in Ontario is very persuasive, obviously, and we are, I think, in this Legislature, familiar with most of those points, that women do not now have a position of equality in our society. Nothing we do with respect to the charter or the accord would want to see us weakening any thrust to remedy that situation.

I am not myself, I suppose, in the first instance, persuaded that because the inequality still exists, therefore the provisions in the charter or in the accord necessarily are weak. I am still wrestling in my own mind, I guess, as to the status of the “notwithstanding” introduction to section 28 in terms of what it does and does not override. I think it is very important in our interpretation of the relationship between the charter and the accord as to what that term does really mean and what weight it carries in terms of its capacity to bear litigation on women’s behalf. So if you have anything more to say on that point, I would appreciate it.

I am struck of course also by the limitation of the charter. I think many people in Canada thought that initially the charter was kind of a holus-bolus thing to handle all kinds of rights situations and then discovered that principally it has to do with the relationship between citizens and government rather than other circumstances that people find themselves in and that there are real limitations there. Whether the accord in some way can go beyond the charter in that respect, I am not quite certain.

The point you make with regard to the Bill 30 case, and the charter and the accord, is certainly an interesting one when one talks about whether the charter overrides the 1867 provisions in section 93 or not. In some of its provisions certainly the charter itself, in section 29, reaffirms 1867 and section 93 by affirming that nothing in the charter derogates from rights accorded under the “denominational schools” provision by or under the Constitution.

Therefore, any setting of the charter in total against the provisions of section 93 in 1867 is at the beginning a nonstarting argument as far as I can see, unless one of course is going to challenge both the moral propriety of section 93 on the one hand and the moral propriety of section 29 on the other, in which case you have a different kind of argument going.



So I am not, myself, at all sure that I personally put a lot of weight in the argument that you cite. If you could respond to that, I would appreciate it.

I would have to be persuaded on somewhat more substantial grounds, I think, that the Quebec round became a men's round denying women's rights if it would appear that the charter under section 28, with the "notwithstanding," in fact can carry the burden of maintaining women's rights. Maybe you would like to respond to two or three of those comments because I am really quite puzzled about the interplay of all those things. That is some initial response that might help you, and it might help me to hear your response to that too.

**Ms. Baines:** I would like to try to respond to these puzzling questions and perhaps you can help me if I do not cover everything you have mentioned. First of all, you raised the question of the interpretation of the "notwithstanding" clause in section 28. I looked at all the cases across Canada that have been reported as having any information whatsoever about section 28 between the time section 28 came into effect, which was April 1982, and last September.

I have not updated my research but as of last September there were 21 judicial decisions that made reference to section 28. Looking at each of those decisions, I discovered, for example, that three of those 21 had absolutely nothing to do with sex equality whatsoever. I am sorry; I could not find it anywhere in any one of those three decisions. Another nine or 10 of those decisions simply quoted section 28 with no commentary, no elaboration on its meaning.

**Mr. Allen:** How did they apply it? To what effect?

**Ms. Baines:** They did not apply it.

**Mr. Allen:** They did not apply it.

**Ms. Baines:** If you will pardon the expression, they simply tossed it into their judgement at some point. The other eight or nine decisions that had more than a sentence, and not many of them had more than a paragraph on the meaning of section 28, had very contradictory information. For example, a provincial Court of Appeal, and it was not Ontario, in a case decided before April 1985, when section 15 came into effect, interpreted section 28 as not having any effect until after section 15 would come into effect. That is before section 15 came into effect.

Another provincial Court of Appeal in another province—I think it was British Columbia and I think the first one was Nova Scotia—in a case

decided after April 1985, after section 15 had come into account, said that it could not use section 28 to make a decision because section 28 was only effective before April 1985. Catch-22: two provincial courts going in completely different directions. I had some problems when I read those two decisions. On the question—

**Mr. Allen:** Section 28 was of no effect because section 15 had come into play, in other words.

**Ms. Baines:** It was only intended to have effect before section 15 came into play.

**Mr. Allen:** Because presumably section 15 incorporated the intent and meaning of section 28?

**Ms. Baines:** The court did not elaborate.

**Mr. Allen:** It did not say.

**Ms. Baines:** The court did not elaborate on this. I assume it was trying to suggest that sex equality was covered both before and after April 1985. The net result was it was not covered in either decision because, of course, you did not have the proper coverage that was necessary. I am one of the people who think that if you have a separate section in the charter, it must have a meaning. I have said that about section 16 of the accord and I say that about section 28. I do not think it is redundant. I think it must have a distinctive meaning from section 15. Like many other people, I am working at what that meaning might be as reported in a judicial decision.

Let me go on. With respect to the "notwithstanding" clause, there have been two lower court decisions attempting to give the meaning of the "notwithstanding" clause in section 28. One, the Ontario trial court in the Blainey case stated categorically—fortunately it was only the trial court—that the "notwithstanding" clause in section 28 could not possibly mean that section 28 overrode section 1 of the charter.

The other—I am sorry; I cannot remember which court it was—said to the contrary, as Professor Hogg said to you yesterday, that there is a strong possibility that the "notwithstanding" clause in section 28 may have an impact on section 1 of the charter. That court—it was not a higher court—said that it was.

So we do not know. I know what the intention of the women who created section 28 was. I was part of them and I know that the intention of the creation of section 28 in April 1981 was that it should speak to the section 1 limitations clause in a very strong voice.

There is only one provincial Court of Appeal decision. It is the Nova Scotia Court of Appeal in the reference with respect to family benefits. It has said categorically and in several pages—the only decision that spends several pages on the meaning of section 28—that section 28 should be given the strongest possible interpretation; but that decision has yet to be applied across Canada and we do not know if that would happen.

So on your first question with respect to the meaning of the “notwithstanding” clause in section 28, I have a hope. I know the purpose of the clause; I know why it was created. I know that it was created six months before, for example, the override clause, which some people sometimes think section 28 was directed at. Section 28 was invented and created long before the override clause was even a gleam in anyone’s eyes. If that “notwithstanding” clause in section 28 has any meaning whatsoever, it has to be with respect to section 1 of the charter. However, we need a Supreme Court of Canada decision to that effect.

If I can combine the first question you asked with your last question about whether we should characterize the accord negotiations, which began as the Quebec round, now as the men’s round—and you related that question to the question of whether section 28 could carry the burden—my answer is quite simply that it does not look like it, given section 16 of the accord. Absent the accord, I would have put my money, my words and every single piece of legal advice I could offer on section 28 carrying the burden. Absent section 16 of the accord, I would have done the same thing.

But unfortunately, given section 16 of the accord, given the specific reference to sections 25, 27, 35 and subsection 24 of section 91 of the various Constitution acts—they are very, very specifically referred to by section number—I would suggest to you that any reading of section 16 by the court will be a reading that says: “What you see is what you get. You don’t see section 28, you don’t get section 28.” It cannot carry the burden that it was intended, that you have suggested it was intended and that Professor Hogg suggested it was intended to do.

I do not know if that resolves your puzzle on those two questions.

**Mr. Allen:** But I think that you—

**Mr. Chairman:** Excuse me, Mr. Allen.

**Mr. Allen:** Okay.

**Mr. Chairman:** I apologize, but I do have some other questioners. I am mindful of the time and also that Professor Lederman is here and we

are going to have questions that I am sure in the future we may wish to put back to Professor Baines. I would like to ensure a couple of other questioners here. Mr. Harris, Mr. Breagh and Miss Roberts; and then, I think, if we could, we will wind up this round and proceed.

**Ms. Baines:** Could I make one brief reference to the question that was raised with respect to the Bill 30 case and section 29 of the charter?

**Mr. Chairman:** Sorry, yes.

**Ms. Baines:** I should note that if you have read the three judgements in the Bill 30 case, you would see that all three of the judges make a reference to section 29 of the charter and then proceed to say they are not resting their decision on that section. So I am sorry, it does not carry the basis of that decision whatsoever. They made their decisions as if section 29 did not exist, and they said so.

**Mr. Harris:** There are two things I wanted to ask. Section 29 you have answered. On the other I think you have answered that in the absence of section 16 in the Meech Lake accord, you would have no difficulty.

**Ms. Baines:** Yes. Please do not hear that as suggesting that you should recommend that section 16 be taken out. I am not making that recommendation.

**Mr. Harris:** No, I understand. But had section 16 not been in there, you would have had no difficulty.

**Ms. Baines:** Had section 16 not been in there, we would have been litigating our hearts out, but we would have felt that we were not placed at any risk, that there was no hierarchy of rights that was causing us problems.

**Mr. Harris:** So it would be your position that section 16 should be there and it should be there with what you want in section 16 as well—in other words, section 28.

**Ms. Baines:** I have suggested that as the starting point. I have also said that my research into the section 28 cases, and more particularly the Ontario Court of Appeal decision in Lucas and Neely, says that section 28 cannot be read alone, it must be read with other sections of the charter. That has led me to conclude that the whole charter should be in the accord.

**Mr. Harris:** So you would prefer that to the omission of 16 altogether?

**Ms. Baines:** Absolutely.

**Mr. Harris:** So you feel that those who pressed for 16—multicultural groups and, presumably, native groups—were wise to press for



16? They needed 16 in the Meech Lake accord to give full effect to what they wanted to achieve out of the charter and out of the 1982 act.

**Ms. Baines:** I think the position that I would take is that the wisdom now is for women's groups to say that they are analogous to those groups, and, in so far as those groups have protection—as best we can tell because of their collective rights and their cultural aspect, according to the federal minister—then the same argument is being made on behalf of women.

**Mr. Harris:** I understand your focus has been on women and that is your expertise, but would you say that they were well advised to press for section 16 to be included in Meech?

**Ms. Baines:** If you are asking me if I would advise them to press for that, with hindsight, I cannot see now how they were wrong to press for it.

**Mr. Breagh:** You may be aware that we have a few little political problems about putting amendments, but one of the things that you have suggested may resolve some of our problems; that is to do a reference. Could you give us a little bit about what it would look like and would you subsequently be prepared to do that in some more detail?

**Ms. Baines:** I would certainly be prepared to do that in some more detail. It is dangerous to say something off the top of my head, but what I would like to suggest is that if you were to look at the constitutional reference case in 1981, I think you could actually borrow some of the language that was used in that particular reference from the three different provinces in order to make the reference in this context. I think it would be perfectly feasible. I think you might also find, as I say, that at least one other province is considering this possibility.

**Mr. Breagh:** We are having a problem of the Premier (Mr. Peterson) saying, "No amendments will be tolerated, you fools." So, to spend a great deal of time and effort putting forward amendments—since most of us can count—is not going to do us a whole lot of good. We are groping about for other, more positive, things that might not cause people all kinds of embarrassment and actually might do somebody some good.

If you would, I for one would certainly appreciate some thought as to what the reference would look like and how we might put that together, perhaps with others who have other concerns. We have used this technique before, with some measure of success. At least it does

alleviate some concerns for some people, so I would certainly appreciate it if you would take a little time and do that.

**Ms. Baines:** You have my services for that.

**Mr. Breagh:** Free services from a lawyer?

**Mr. Chairman:** If I might just make a comment, Mr. Breagh, I think it is useful that you raised the point. I have stated very clearly that this committee is going to listen to the testimony that is given before it and, in due course, will consider the recommendations that it wishes to make. As Mr. Breagh says, there are some other things floating around, but in terms of what this committee will do, that will be up to this committee. I think it is quite appropriate that we consider options such as the one that you have mentioned.

**Miss Roberts:** I will be as brief as I possibly can, Mr. Chairman. Thank you very much, Professor Baines. It was excellent, and I enjoyed the way you took us through the argument.

One thing I would like to ask you is with respect to section 27 of the charter. It indicates "multicultural heritage of Canadians," and your argument was that there is a culture—a woman's culture. Could it not be argued that we are caught within that multicultural heritage? Is that not a possibility? Therefore women's culture, or whatever you would like to call it, falls within 27 as well, therefore within section 16 of the accord?

**1130**

**Ms. Baines:** I think that argument could be made. I do not subscribe to it. I think that when you talk to women from across cultural groups, you find commonalities. I think indeed that is what sociologist Jessie Bernard is writing in her most recent book, the title of which I have forgotten, but it is something like *The International Cultures of Women*. You will find that women's culture cuts cross-culturally and we have indeed a shared experience as women that constitutes a culture. We are just exploring that at the moment. We do not know the dimensions of it. I would be hard pressed to describe it to you. I would certainly suggest Jessie Bernard's book as a starting point.

**Miss Roberts:** So it is something that is not definite enough in your own mind that you can use as a legal argument to put forward in front of a court.

**Ms. Baines:** In front of a court? If you offered me the challenge, I would do it.

**Mr. Chairman:** Professor Baines, I want to thank you again very much for the paper in which you have presented to us a number of the

avenues. I think, as Mr. Allen said, you have put before us a number of things that we are going to have to consider, reflect upon, think about and relate not only as we go through the hearings but also as we are considering our report. I think it is fair to say that we may very much want to talk to you again about some of those points, and we will certainly keep in touch in exploring some of those matters that perhaps we have not had an opportunity to raise at this point or which arise later in our own discussions. Again, I want to thank you very much for coming down from Kingston and being here with us this morning.

**Ms. Baines:** Thank you, Mr. Chairman. I would welcome any future conversations.

**Mr. Chairman:** We will now move to our second witness, Professor Lederman. I apologize for the fact that we are somewhat behind time, but I can assure you, sir, that we will make sure that we cover as fully as we need to, the presentation that you will be making and offering our questions.

The clerk is giving out to the members a copy of your constitutional article that appeared in the *Financial Post*, which I believe Professor Baines also made mention of. Perhaps, Professor Lederman, we could ask you to summarize the main points of that argument. That would enable us to put some questions to you which would further amplify your comments. Please feel free to add anything else that you would like to do at this time.

I might just add for the members of the committee that Professor Lederman was a member of the Ontario Advisory Committee on the Confederation, which former Premier John Robarts set up in 1965. He was very much involved in the process for the Ontario Confederation of Tomorrow Conference and the first round of constitutional discussions which took place from 1968 through 1971, so he is certainly no stranger to these issues.

It is a pleasure for us to have you with us this morning. I will turn the microphone over to you.

DR. W. R. LEDERMAN

**Dr. Lederman:** Thank you for your welcome, Mr. Chairman. It is an honour to be invited to appear before this committee. After 30 years, I count myself a citizen of Ontario as well as a citizen of Canada. I am very much concerned that Ontario should continue to play the leadership role it has always played in constitutional issues in Canada.

I have about 15 minutes of opening remarks I would like to make and then I will be open to

questions. I do not have the opening remarks in a text I can distribute, but I would like to make them first and then respond to questions. The document that has been circulated to you is what I published on August 31 in the *Financial Post*, and that is the article which my respected colleague and friend from Queen's, Beverley Baines, responded to one week later. I think she has, in effect, given you her arguments, the arguments for the position she published in the *Financial Post*, in her presentation this morning.

First, let me say unequivocally that I regard the agreement on the constitutional accord, Meech Lake, and the draft of amendments to implement it, Langevin, as a very fine political achievement in the highest sense, in the best sense of the word "political." Successful drafting of basic constitutional provisions like these is a very demanding enterprise. Such constitutional provisions have to be brief and in general terms. One wants 10 pages, not 10,000.

Just as a matter of the capacity of language alone, doing this is difficult in either English or French, though these are two of the greatest languages of world civilization. There are limits to the capacity of words to convey meanings with certainty and to project those meanings to control future events. Words are imperfect vehicles of meaning but they are all we have. We have to do the best we can.

In addition to these linguistic difficulties, for constitutional drafting there has to be a high degree of political consent to the formulas of words used.

Nevertheless, the 11 first ministers and their advisers have met the linguistic and political challenges, I think, very well. The Langevin draft is not perfect, but perfection is simply not attainable in these matters in any event.

You may think I am belabouring the obvious on these drafting points, but, with respect, I do not think I am. What I have called elsewhere the documentary fallacy about laws, especially constitutional laws, goes like this: If somehow you can just get the right combination of words down on a piece of paper, societal problems can all be completely solved. In other words, whatever is wrong with constitutional provisions is caused by bad drafting and can be fixed, fixed completely, by good drafting.

Much of the adverse criticism of the Meech Lake accord and the Langevin draft is, to some extent at least, based on this fallacy. I say again these documents are not perfect, but they do about as well as can be done. Critics who would redraft these constitutional provisions would, I



believe, quite possibly cause more problems than they would thereby solve.

### 1140

Then what is the usefulness of constitutions and how do they enable us to face the future and to maintain a peaceful, viable society? It is characteristic of constitutions that they are mainly devoted to setting up institutions and laying down processes whereby ordinary laws are regularly made in great volume, detail and variety as they are needed in the future when new societal problems not now foreseeable arise and demand attention. When I say "ordinary laws," I mean statutes of legislatures like the Legislature of Ontario and the Parliament of Canada.

Hence, the main thrust of legal change depends on the continuous functioning of parliamentary bodies to make ordinary statute laws and on the continued functioning of the independent courts to interpret those statutes. These are the traditional functions of legislatures and courts.

In addition, since 1982, the superior courts have acquired, by virtue of the Canadian Charter of Rights and Freedoms, a review function with respect to ordinary statutes which is a power to take a second look, in some circumstances, at what the parliamentary bodies have enacted, in order to ensure that their enactments have observed certain basic, substantive and procedural standards that obtain in our free and democratic society and that are declared in the charter.

The primary initiative is with the parliamentary bodies. What the courts have is a selective power of review of what the parliamentary bodies have done. I can perhaps illustrate this by an analogy to major athletic contests. You can think of players and you can think of referees. It is the parliamentary legislative bodies that field the teams and plan the strategies in major athletic contests. But for those contests you have to have referees, and the judges are the referees, now with some added power of refereeing because of the charter. The judges cannot play the game, they cannot field the teams and plan the strategies, but you cannot have the game without the referees, without the judges. You need the referees too.

But the functions are somewhat different, and this becomes quite clear when you realize that what the courts have, by way of power to enforce the charter, is a power to strike down legislation which does not meet charter standards, to make that binding and then to strike it down, but they cannot put anything in its place. Only the legislatures can do that.

One thing we need to be very careful about, I think, is to remember the importance of the political process, the importance of our democratic representative legislative bodies and that they are the prime reactors in legal chains. I do not disparage for one moment the importance of the judges, the importance of the referees, but they cannot play the game. They can oversee to a certain extent how the game is played.

I want to turn now briefly to the linguistic duality, "distinct society" clause of the Langevin draft, because it draws attention to something that has always especially concerned Ontario as well as Quebec throughout Canadian history from the 18th century to the present. The linguistic duality "distinct society" clause is intended to be section 2 of the act of 1867.

"(1) The Constitution of Canada shall be interpreted in a manner consistent with

"(a) the recognition of the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and

"(b) the recognition that Quebec constitutes within Canada a distinct society."

Then it speaks of the role of the Parliament of Canada and the role of the legislature and government of Quebec. Subsection 4 says:

"Nothing in this section derogates from the powers, rights or privileges of parliament or the government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language."

This states the historical societal facts, I think, clearly and correctly both in terms of the French language and the English language. My point is that throughout this whole historic period, the English speaking leaders of Upper Canada—later called Ontario—had been leaders in national accommodation to the French fact in Canadian life. And Ontario very much has a leadership role to play at the present time.

As long ago as 1848, this was an important feature of the winning of responsible government from the British. In the old United Province of Canada from 1841 to 1867, Ontario and Quebec were one province, the United Province of Canada, from the Gaspé to Windsor. This had been legislated by the British Parliament in response to the Durham report.

The Durham report had two principal features. It recommended that responsible government, that is, cabinet government, should be granted to

the British North American colonies over all domestic matters, which would mean that the cabinet had to be drawn from the party that controlled the legislature. That was not the situation in 1840.

On the other hand, the Durham report also recommended—and this was just after the Rebellion of 1837—that the problem posed by the French Canadian presence in Quebec should be solved by assimilation of the French Canadians into the anglophone culture and the anglophone group. In the Parliament of the United Province of Canada, the only official language to start with was English. The amalgamation of the provinces, Upper and Lower Canada, had taken place without any real consent of the French Canadians of Lower Canada. So it was a low point for the French Canadians in Lower Canada.

### 1150

At this time, Robert Baldwin was the Reform Party leader in Upper Canada and Louis Lafontaine was the French Canadian political leader in Lower Canada. Robert Baldwin approached Louis Lafontaine in a secret correspondence—first, it was secret and confidential and then it became open, of course—and Baldwin said to Lafontaine in effect, “Let us work together to accomplish responsible government.” The British government was dragging its feet and was not going to grant that part of the Durham recommendation, not right away.

“Let us work together,” Baldwin said to Lafontaine, “to advocate and to secure the grant of responsible government. Once we do that, we will control the legislation of the Parliament of Canada and we can address the grievances which you and your people feel so deeply.” That is what happened. The Baldwin-Lafontaine alliance did win its point.

In 1848, the British government did grant responsible government and, very shortly, French was added to English as an official language of the Parliament of the old Province of Canada. There you have the Ontario leader and the Quebec leader getting together not only in the interests of a continuing country but also in the interests of justice and accommodation within that context for the distinct society in Lower Canada, the French Canadians.

The Baldwin-Lafontaine story is not very well known, but the Confederation story, which is much better known, is the same. George Brown and John A. Macdonald buried the hatchet long enough to make an arrangement for a federal system with Cartier, the effective political leader in French Canada. That is a better known story,

so I will not go on, but it illustrates again my point about the important role that Ontario has always played in these deliberations and the progressive and accommodating role Ontario has played. That has continued for us ever since, and particularly since the Second World War. I think that part of it is well known to you.

Premier Peterson's support for the Meech Lake accord is, in my view, very much in the best tradition of Ontario's historic record of leadership. The purpose of the Meech Lake accord and the Langevin draft, their overwhelming purpose, is to repair the omissions of 1981-82 when we instituted patriation, new amending processes and the Charter of Rights without the consent of the government of Quebec. I am not going to rehearse those events, except to say that the federal government and Parliament and the other nine provinces did it reluctantly, but they found it was necessary to proceed with nine provinces consenting and the federal Parliament consenting.

I think it was clearly understood at that time that the effort would have to be made to win the willing consent of Quebec to the new constitutional arrangements. Meanwhile, as a form of protest, Quebec has been boycotting federal-provincial processes at the amending process, and this is by common consent in Quebec. The unhappiness with the events of 1981 and 1982 was shared by the Liberal opposition of the day in Quebec as well as by the Parti québécois government.

The Quebecers will admit that technically the changes of 1982 are in force in Quebec, and so they are, but it is not good enough to have a merely technical, legal validity of our basic constitutional arrangements in Quebec. That needs remedy. Mr. Mulroney and Mr. Bourassa both campaigned and won elections on the footing that they would seek a remedy, and to make a long story short, they have done so.

It is most important that this effort should succeed because the Quebec government put forward requests for changes which would satisfy them and by virtue of which they would signal their willing assent to the arrangements of 1982, as amended to comport with the specific requests that they made. That is what the Meech Lake accord and the Langevin draft are all about.

If it goes through successfully, then we proceed, with our new amending processes and with Quebec collaborating, to deal with other problems which need specially entrenched constitutional changes. The western provinces particularly, and perhaps many other people in the



country besides, want to see reform of the Senate in Ottawa, and that requires constitutional amendment. It is inconceivable that it should take place without the consent of Quebec. We have already made some attempts to constitutionalize aboriginal rights but Quebec has been abstaining, and again I doubt whether that can be accomplished without the co-operation of Quebec.

So I think we should keep our eyes on the main thrust of these proposals, which is to restore political legitimacy to the Constitution in Quebec and thereby to facilitate all the changes and developments that may necessitate further constitutional change. Since this contemplates changes in the amending process, under the rules of 1982 which we are now following, this requires unanimous consent of the 10 provinces, signified by their respective legislatures, and of the Parliament of Canada, signified by a resolution from the Parliament of Canada.

#### 1200

Other things of equal importance which we may want to do will likewise require that kind of support, widely distributed consent in the country, so what we have now in the Meech Lake and Langevin proposals is an attempt to work the 1982 amending formula. If it turns out that we cannot do this, that it breaks down and some of the essential consents go missing, when can we make that amending process work and when would we be able to get unanimity and on what subject?

This is what worries the people who say, and I am one of them, that the Meech Lake accord, the Langevin draft, is about as good as it can be right now given the limitations of language and politics, and that if special interest groups are allowed to cause amendments to it, then this sort of submission will multiply and the whole deal with unravel. I think this is a very real fear and there is a very great deal at stake, as I have tried to indicate.

I think the Quebec requests are reasonable. Many of the very experienced people who appeared before the Ottawa committee in August, Gordon Robertson, former Clerk of the Privy Council, Jack Pickersgill, the grey eminence of the federal Liberal Party and Robert Stanfield, these people all said: "This is a very good proposal which has come to us with the approval of a government of Quebec. We should take this opportunity. We should open this window of opportunity and use it. If we do not, then we are going to have to get along without any significant constitutional change."

I honestly do not think the Meech Lake accord is a serious threat of any kind to the integrity of the distribution of federal and provincial legislative powers, the federal-provincial division of legislative powers, which is at the core of the federal system. I do not think it threatens any impairment there, and section 16 or no section 16 of the accord, the Langevin draft, I do not think, prejudices in any way the charter rights of any citizens or groups in this country.

The federal committee reached the conclusion that with respect to the charter, what many of the groups who were genuinely uneasy, genuinely agitated about—I do not deny for one moment the genuine character or the good faith of those who would like to see something changed; I do not question this. The federal committee concluded that what the dissenting groups were complaining about was primarily the Charter of Rights itself, Meech Lake accord or no Meech Lake accord.

It was a surprise to many people to discover that there are two stages to defining a charter right. Because of section 1, the rights as set forth in the charter are guaranteed but are subject to reasonable limitations. That makes the final definition of charter rights a two-step process and you do not have the charter right defined until you have taken both steps. Gradually, as the cases come in and the precedents build up, what reasonable exceptions will get through and what reasonable exceptions will not, will develop from judicial precedent. These matters are very complex and it is inevitable that we should have to rely on the independent judiciary for these, what you might call, fine-tuning adjustments. It is inevitable that we should and it is going to take some time to build up the precedents that will give the charter meaning.

But the point I am trying to make is that so far as a constitutional document can do so, to be specific, the charter protects and honours women's equality rights. Any limitations that there are on that, are internal to the charter and would not be the result of any section of the Meech Lake accord having an adverse effect on the Charter of Rights. That was the basic conclusion of the federal committee and I agree with it.

Those are my opening remarks. At this point, I am prepared to invite your questions and I will do my best to respond as lucidly as I can. I say respond rather than answer because some of the answers are far in the future.

**Mr. Chairman:** Thank you very much, Professor Lederman. In the committee we forget sometimes that there are cameras around, and in

identifying you at the beginning, I neglected to note that you are, of course, a professor of law at Queen's University, the former dean of law as well as the other things I mentioned in terms of the Ontario Advisory Committee on Confederation. I would not want to pass without noting your strong ties to Queen's University.

1210

**Mr. Offer:** Thank you very much, Professor Lederman, for your thoughts on the matter we have at hand. I guess what I want to do is zero in on a point you have raised, not only this morning but also in the article you prepared for the *Financial Post*. In the main, I would suggest it really deals with the effect of section 16 of the accord.

This morning we heard Professor Baines' concerns with respect to section 16. I think it is fair to say she indicated in her brief that the sections referred to in section 16 did confer rights, as opposed to being interpretative provisions. Professor Hogg yesterday indicated that those sections dealing with multicultural groups and aboriginal peoples were merely interpretative. My question to you is your position with respect to the impact that section 16 would have as a threat to women's rights, as has been indicated by Professor Baines this morning.

**Dr. Lederman:** I think Professor Baines' objections to section 16 relate to what is not in it rather than to what is in it. I think what is in it is purely interpretative. Let me read two of the things that are in it. Section 16 of the Langevin draft says, "Nothing in section 2 of the Constitution Act, 1867, affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982, or class 24 of section 91 of the Constitution Act, 1867."

Section 25 of the charter says, "The guarantee in this charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

"(a) any rights or freedoms that have been recognized through the royal proclamation of...1763; and

"(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement."

Subsection 25(b) was amended by the Constitution Amendment Proclamation, 1983. This did go through with consent. It now reads, "Any rights or freedoms that now exist"—those are new words—"by way of land claims agreements or may be so acquired."

Section 27 of the Canadian charter says, "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Now, people like me call sections 25 and 27 interpretative clauses because they say that something else shall not be construed so as to do so and so, or this charter shall be interpreted in a manner consistent with so and so; so we call them interpretative.

Now listen to section 28: "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." That is more than a merely interpretative clause, and so in my mind, that is what puts section 28 in a somewhat different category from sections 25 and 27. It is an interpretative presumption, but much more. It gives, I think, special emphasis to sex equality rights.

I am quite happy with that. I am in favour of women's equality rights. I recognize that women have been a disadvantaged group as far as the male-female dichotomy is concerned. I recognize that, so naturally they are the persons most interested in the equality rights for women, which are among the guarantees of subsection 15(1). I am in favour of that. I am in favour of the progress that has been made, with pay equity legislation and so on, and I am in favour of more of it.

But I do not accept that section 28 is in the same category as sections 25 and 27. Neither is it in the same category with the linguistic duality, "distinct society" clause proposed in the Meech Lake accord because that is specifically stated to be an interpretative principle. There is a saving clause which I read out earlier to the effect that the legislative powers of the federal Parliament and the provincial legislatures have not been abrogated or derogated from, which stamps it as interpretative. So there is some sense to putting section 2 of the Langevin draft together with sections 25 and 27.

Section 28 is very strongly worded and I think it does not need any assistance from the Meech Lake accord. I cannot think of stronger words to use, anyway, and it carries right through. It will be there after the Meech Lake accord if the Meech Lake accord is enacted. It is there now and there is nothing in the Meech Lake accord that will derogate from it, as far as I can see.

Now, just to complete the picture, section 16 of the Meech Lake accord mentions section 35 of the Constitution Act, 1982, and class 24 of section 91 of the Constitution Act, 1867. Class



24 of 1867 is "Indians, and lands reserved for the Indians." Section 35 is outside the charter, just as class 24 is. The charter ends at section 34. Section 35 is outside the charter and section 35 was amended in 1983.

# 1220

In 1982, subsection 35(1) said, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." That is pretty substantive. It is not just interpretative. Subsection 35(2): "In this act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Metis peoples of Canada." That is as far as section 35 went in 1982.

But again, in 1983 at the conference on aboriginal rights they did manage to get agreement on these changes. There is now a subsection 35(3): "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." That was new in 1983. And subsection 4, "Notwithstanding any other provision of this act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

If, in relation to aboriginal rights, section 28 needed any more help, it has got it. It is in the specially entrenched Constitution now. Some of the special arrangements for aboriginal peoples will be *prima facie* in breach of provisions on racial discrimination. You are taking a racial group and doing something special about it. On the face of it, they may be in breach of that.

That is what section 25 is about. "The guarantee in this charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal treaty or other rights or freedoms." The substantive clause conferring aboriginal rights is section 35 in the Constitution Act, not in the charter, but it reiterates the injunction of section 28, which says, "Notwithstanding anything in this charter." So section 28 does not reach to section 35. Well, it has been made to reach and I think that point is worth making.

I do not know whether I have been able to answer you, sir.

**Mr. Offer:** It seems what you have been saying is that with respect to section 16 of the accord, and primarily to sections 25 and 27 as contained in section 16, they are in your view clearly interpretative sections, as opposed to the rights-giving type of section.

**Dr. Lederman:** In effect, you are simply repeating what is already in the charter.

**Mr. Offer:** And section 28 is something else other than an interpretative section?

**Dr. Lederman:** Yes.

**Mr. Offer:** And as such need not be included in section 16?

**Dr. Lederman:** Yes, and the substantive provision, section 91, class 24, the federal legislative power dating from 1867 over "Indians, and lands reserved for the Indians," is outside the charter, so that is not caught by section 28. Section 35 is outside the charter. The injunction of section 28 has been inserted. In other words, section 35 says special arrangements for self-government, for example, for aboriginal groups, yes, but they must not embody discrimination between men and women.

**Mr. Chairman:** I have Mr. Allen, Mr. Harris, Mr. Morin and Mr. Cordiano. I think perhaps that would complete our questioning.

**Mr. Allen:** Thank you very much for being with us this morning, Professor Lederman. Notwithstanding everything we have been through in the last few minutes, I guess the fundamental position you present essentially is that section 16 is necessary in the accord because all parts of the Constitution are equally present to all other parts and provide a context for the interpretation of every single part of it and must therefore be applied in every case of litigation.

As I understand it, that does sit very much over against what Professor Baines put before us, using the judgement on Bill 30, which was that there had in fact, in a certain section of the Constitution, been some assertion of the independence of that section with respect to the charter and that therefore the charter did not impact essentially upon section 93.

You refer in your article to the uniqueness of section 93 with respect to the constitutional settlement of 1867. But by the same token, Professor Baines refers to the uniqueness, I suppose, of the circumstances of the present, whereby the 1982 agreement is unique to another compromise that is necessary, apparently, to bring Quebec fully into the constitution.

I am wondering how we in this committee are supposed to handle what appears to be some contradiction in your own position regarding the equal presence of the full context that the Constitution provides at all points to all other points, and yet the exclusion of some part of the Constitution for certain specific judgements vis-à-vis some aspects of common life together, such as denominational schools.

**Dr. Lederman:** We are talking now about the collision of constitutional provisions of equal status, specially entrenched constitutional provisions, not ordinary statute law, which are inconsistent one with the other. In those circumstances, a choice has to be made and the courts make the choice. I go on in my Financial Post article to indicate how it is done.

I point out another thing in the article that I will point out again, speaking of the judgement of Madam Justice Wilson. Section 29 of the charter itself is rather explicit and my impression is that Madam Justice Wilson had it in mind. It says, "Nothing in this charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools."

What we are involved with there is holding at arm's length the charter provision against religious discrimination because that is what is involved in separate denominational schools. That is part of the warp and woof of Confederation, 1867, and was one of the original Confederation bargains.

#### 1230

What I said about section 93 was to the effect that the section is unique because it grants the legislative power over education to the provinces and then proceeds to limit that power in favour of certain denominational schools for Protestants in Lower Canada, Quebec, and Roman Catholics in Upper Canada, Ontario. It specially entrenches that right to denominational schools, which means it specially entrenches a right to that particular item of religious discrimination. So one could not complain then and one cannot complain now if the Roman Catholic school system insists on hiring Roman Catholic believers in good standing with the church.

I am not saying that for every employee and every teacher of every subject they have to hire a Roman Catholic, but in certain sensitive areas they can certainly insist on it, and they do. I am not trying to get into all the detail of that. I am just trying to make the point that if either the public school boards or the separate school boards were to make regulations that they would hire only men or that they would hire only women, that would be struck down, not protected by section 93, which is the religious character of the separate school organization and fair funding for the organization. Those are the two things that are protected. I make that point in my Financial Post article.

Another point I make is that in the great patriation case of September 1981, nine judges sitting, it was six to three against the federal government, in favour of the proposition that the substantial consent of the provinces was necessary as a strong constitutional convention. Three judges dissented. It was seven to two on the legal issue, different combinations.

But all nine judges agreed on one thing. They agreed on the fact that they should take jurisdiction and they should pass on the allegations from the dissenting provinces and the allegations of the federal Parliament, because the proposed charter—it was just proposed at that time—would diminish, selectively and only partially, but it would diminish the legislative powers granted in 1867, both to the federal Parliament and to the provincial legislatures. So they said, "We must look at this."

In other words, they said, "Once the charter goes in, legislative powers are going to be diminished when the charter is applicable. That is why there are vital issues for every part of the country in this matter and why we, the Supreme Court, affirm our jurisdiction to pass on this. It is not just a matter that concerns the federal Parliament or one of the provincial legislatures." They certainly held there that if the charter was put in, the normal rule would be that the legislative powers in sections 91 and 92 of 1867 would not be charter-proof.

With respect, my colleague Professor Baines is suggesting, I think because of something that Madam Justice Bertha Wilson said, that generally those powers are charter-proof. If they were charter-proof, then the charter means very little. In the face of the patriation case, where nine Supreme Court judges—Madam Justice Wilson was not on the court at that time, I do not think—I do not think she had any intention, nor did any of the other judges have any intention of contradicting the finding of 1981.

The other point about section 93 of the 1867 legislation is that it has a complete remedial scheme within itself. It grants legislative power to the provinces over education. It limits that power in favour of guarantees for certain religious groups, and there are five or six religious groups guaranteed in Newfoundland in the terms they have given it.

Then it provides a special procedure, which is the procedure to be followed if the specially protected rights guaranteed are breached. It involves a petition to the Governor General, a remedial order from the federal cabinet, and if that is disobeyed, remedial legislation is possi-



ble. In other words, there is a complete package there, and I think that is one thing that Madam Justice Wilson is making clear. The denominational school rights are unique because the remedies to be used are right in there and you have a complete package.

The attempt at a remedial order and remedial legislation was done in 1896. It was attempted. The life of Parliament expired before the remedial legislation could get through. It was defeated, and then the party opposing it won the next election, which was, strangely enough, the Liberal Party under Sir Wilfrid Laurier.

I think Madam Justice Wilson should be read in that limited way, that she was treating denominational school rights as unique.

I think 91.24, Indians and lands reserved for Indians, would be read as applicable to all the aboriginal peoples now. There is legislative power in the federal government. I think the point the justices are making about 91.24 is that there is almost no way that 91.24 could be used without being racially discriminatory. What it contemplates is special legislation for the Indian people. That sets that group apart. But again, that is a limited problem and a special problem and is now modified by section 35, which I read before.

Everything within 16 can be accounted for either on the grounds that it is interpretative or on these other grounds, so I continue to hold the view that section 16 need not be there because section 35 could stand on its own feet as far as aboriginal rights are concerned, and the charter can stand on its own feet. You only need to say section 25 and section 27 of the charter once and you only need to say section 28 of the charter once and you have said it in the charter.

1240

**Mr. Chairman:** I am conscious of the time. I wonder if I could go to Mr. Morin and perhaps we will close it off. Undoubtedly, there will be questions arising as we go through all this. If we can, Professor Lederman, as I said to Professor Baines, we may wish to pose some other questions to you as we move along.

**Dr. Lederman:** This will be at a later time. I should warn you I will be in New Zealand from March 1 to April 15.

**Mr. Chairman:** We would be delighted to come.

**Mr. Morin:** Some feel the "distinct society" clause is going to grant special legislative power to Quebec, for instance, to pass law promoting its own distinctiveness. Do you believe this section is a grant of legislative power? Also, what effect

would it have on Franco-Ontarians? What effect would it have, for instance, on English Quebecers?

**Dr. Lederman:** I am getting mixed up in my books of reference. I think the clause is to the effect that the presumption in favour of a distinct society in Quebec is a presumption of interpretation. It will be used as an aid to interpretation in construing the distribution of legislative power, but it does not amend the distribution of legislative powers, it does not change it: "Nothing in this section derogates from the powers, rights or privileges of Parliament or the government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language." So it is interpretative.

Section 2 throughout is carefully balanced. It is linguistic duality, distinct society, and it recognizes the English-speaking Canadians in Quebec and the French-speaking Canadians outside of Quebec. The largest group of them outside of Quebec is in Ontario. The largest percentage of provincial population outside of Quebec is in New Brunswick, I think, where the Acadians represent about 40 per cent of the population. The way section 2 is expressed carefully balances these two things.

The distinct society point has always been part of the consciousness of the courts, something of which they have taken judicial notice. It is not new, it is an historical fact, as I said in my opening remarks. The courts have always been conscious that realistic interpretation has to take account of sociological, linguistic, ethnic facts. I think all that the "distinct society" clause does is to make explicit that which has been implicit in the past as far as the courts are concerned. Since it has, for them, been implicit, though it has not been stated anywhere in a constitutional document, they have nevertheless applied it as a presumption of interpretation.

If you want to see an example of that, look at the judgement of Chief Justice Deschênes, as he then was, in the Protestant school board case judgement in September 1982. The judge made the courts and the lawyers work all summer because, he said, "The parents have to know by fall and we have to get this settled."

This was an interpretation of article 23 and minority-language education rights in Quebec. Chief Justice Deschênes entertained section 1 arguments, namely about the Quebec clause of Bill 101, which was more restrictive than the Canada clause in article 23 of the charter about which parents could send their children to the

English-speaking schools. He entertained the argument that Bill 101 was a reasonable limitation on article 23 of the charter.

He entertained arguments from counsel for the Quebec government on what the effect would be on the prevalence and the integrity of the French language, and what the population of the schools would be at the turn of the century, if you followed one clause and what the population of the two school systems would be at the turn of the century if you followed the other clause, the Quebec clause-Canada clause.

He came to the conclusion that there would not be enough difference in impact on the French language and French culture, that the government of Quebec had not been able to prove its case, the case that alleged that the integrity and security of the French language and culture would be impaired. There just was not evidence of that. That was a "distinct society" argument. He weighed it and rejected it.

Your next question to me naturally is, "If section 2 is simply making explicit that which has been implicit, why all the fuss about it, and why, indeed, should the Quebec government attach some importance to it?" I think the Quebec government wants to be assured that it can raise that type of argument in a section 1 argument under the charter. I have no inside sources of information, but I can see this advantage to them. They feel more secure looking into the future if that which has been implicit is made explicit. That is just as a presumption of interpretation. They are not asking for it to be pushed any further than that. They have agreed to it just as a principle of interpretation.

In other charter issues, if there is a "distinct society" problem, the "distinct society" feature of sociological fact and societal values will take its place in a section 1 argument, but it will compete with all the other things that can be

brought in there as well. I think the Quebec government values having this said explicitly for symbolic purposes and for the practical purpose that it legitimates counsel for the Quebec government arguing on the validity of Quebec legislation.

Section 2 also contains presumptions about the linguistic duality of all the provinces as far as French and English are concerned, so I think this is a reasonable request in the Quebec proposal.

**Mr. Chairman:** I want to thank you for coming and spending this time with us. We appreciate particularly what I would call the historical judicial perspective which you have placed on a number of these issues and the points you have raised about the judicial process and the legislative process, which is I think one that we want to consider or put in with the various other views that are being brought forward. Your specific reference to a number of issues is most helpful.

I do not know whether the committee, in its wisdom, will decide to follow you to New Zealand, but we certainly wish you well. We are very grateful that you came here today and shared some of your thoughts with us. If there are some other queries, we will try to make sure we do that before you depart for the south seas.

**Dr. Lederman:** I am very grateful for the courteous and helpful reception the committee has given me, which is not to say that I have necessarily persuaded you. I know you have not had a chance to read this yet, but perhaps if you can read it in a brief form, it does state my main position.

**Mr. Chairman:** The committee will reconvene at 2:15 p.m. The committee stands adjourned.

The committee recessed at 12:54 p.m.



## AFTERNOON SITTING

The committee resumed at 2:24 p.m. in room 151.

**Mr. Chairman:** The chair sees a quorum. We will begin our afternoon session.

C'est un grand plaisir, professeur Beaudoin, de vous accueillir ici à Queen's Park cet après-midi. Le professeur Beaudoin est le directeur du Centre des droits de la personne de l'Université d'Ottawa. Il est, lui aussi, un spécialiste dans le domaine du droit constitutionnel et il a préparé un texte pour nous cet après-midi. Alors, sans plus tarder, je vais vous passer la parole. Nous pouvons commencer.

GÉRALD-A. BEAUDOIN

**Me Beaudoin:** Merci, Monsieur le Président, mesdames et messieurs du comité. C'est un grand honneur que d'être invité à comparaître devant vous pour un sujet de la plus haute importance non seulement pour la province de l'Ontario mais pour le Canada tout entier, et je suis sensible à l'honneur que l'on me fait de m'inviter ici. J'enseigne le droit constitutionnel à l'Université d'Ottawa et je suis en même temps un juriste du Québec, et je pense que ces accords Meech et Langevin sont de la plus haute importance pour l'avenir du Canada.

J'ai apporté un texte en français et en anglais également. Alors, j'ai fait distribuer le texte en anglais et ceux qui veulent en avoir une copie en français sont également les bienvenus. J'avais l'intention de parler assez rapidement de cet exposé-là pendant 35 ou 40 minutes, et après, de répondre à vos questions—je suis sûr qu'il y en aura—sur les cinq points de l'accord, ainsi que sur d'autres points comme, je ne sais pas, moi, l'article 16, les francophones, les minorités, etc.

Je passe immédiatement à la page 2 de l'exposé et à la formule d'amendement.

Our amending formula now has been entrenched in the Constitution since 1982, but it is not a formula of amendment that protects, in my own opinion at least, Quebec in the proper way. In other words, the provinces have the right to opt out, but we cannot opt out of the Supreme Court, the Senate or the House of Commons. So there are some weaknesses in the formula of amendment itself. It is not clear that the civil law system of Quebec is adequately protected in the formula of amendment. It is not sure that the existence of the Supreme Court, as Professor Peter Hogg, my colleague, has stated, is protected.

So the Meech Lake accord, in dealing with the entrenchment in the Constitution of the existence of the Supreme Court, the civil law composition of the Supreme Court and the unanimity rule to change those aspects of that Supreme Court is a step in the right direction.

The Meech Lake accord is going to merge sections 41 and 42. It means that the amendment to the Senate and the amendment to the composition of the Supreme Court will require unanimity. It is, of course, more stringent, but it is the only way, in my own opinion, to protect a province like Quebec in the central government, that is, in the Senate and in the central institution.

The criticisms are to the effect that the formula of amendment is becoming much more stringent, but one should not overdo this. It is true that we will now need the unanimity rule for five other subjects that are listed in section 42, but the formula of amendment is still the same, the general one. That is, we need seven provinces representing 50 per cent of the population.

I think the formula is still realistic because extending the unanimity rule to matters as fundamental as proportional representation in the House of Commons, the joining of territories to existing provinces and the creation of new provinces, in my own opinion, does not make the amending formula a straitjacket.

**1430**

Since 1927, all prime ministers starting with Mackenzie King, Louis St. Laurent, Diefenbaker, Pearson, Trudeau, Clark and Mulroney sought to avoid unanimity as far as possible, but they all accepted that in certain areas we need some unanimity.

So for the moment, this is all I will say on the formula of amendment. I would be pleased to answer any questions later on.

The second point is the Supreme Court of Canada. We all realize more and more, but it has been obvious for a few years, that the Supreme Court of Canada is more and more important. The Supreme Court of Canada is playing more and more a role in our social, political, judicial and legal life. The existence of the court is not consecrated. It is not entrenched in the Constitution. It has to be entrenched. This is the case in the United States. The court is entrenched in the American Constitution, but it is not in Canada.

Nobody objects to the entrenchment of the Supreme Court in the Constitution for two

reasons. First, the Supreme Court mediates between the two levels of government in the case of the division of power. Second, as we have seen for two or three years now, the Supreme Court interprets the Canadian Charter of Rights, which is, as you know, fundamental.

Our Supreme Court has been supreme since 1949, since the privy council appeals were abolished. Our Supreme Court owes its existence only to a simple statute. Now the time has come to entrench the existence of that court in the Constitution. It is already the case under section 41 of the Constitution Act of 1982, but it is not too clear-cut, at least according to Peter Hogg. I agree with Peter Hogg on this point, that we have to entrench that more clearly.

The second point is the civil law composition of the Supreme Court. We now have nine judges and three of them come from Quebec. This is provided for in a statute, but we have to say that clearly in the Constitution itself. So the wording of section 41 was not good enough on that point and I think the Meech Lake accord is going in the right direction to enshrine the civilian composition of the Supreme Court.

The independence of the Supreme Court, of course, should also be entrenched in the Constitution.

The most difficult point, of course, is the appointment of the judges on the Supreme Court of Canada. Since 1875, the Prime Minister of Canada, the government of Canada, may unilaterally appoint a jurist to the Supreme Court without consulting any province, without consulting the Senate or the House of Commons. In a federal state, I do not think this is good enough. Several governments, Pearson's, Trudeau's, Clark's and all the others, have all agreed that we should change that system.

Several formulas have been suggested: mandatory consultation of the provinces, ratification by a second chamber like in the United States, an alternate provincial and federal list, and finally, a provincial list and a double veto. The Meech Lake accord favours the double veto.

In the United States, it is the President who appoints a judge, but under the Constitution of the United States, as we all know, the choice shall be ratified by the Senate. It is not automatic, as we have seen in the case of Robert Bork. As a matter of fact, I think that 27 nominees of the President of the United States have been rejected by the American Senate—27 out of 135. But the system works. Sometimes there may be a stalemate, for example, this year, but this is very rare. It works.

As a matter of fact, Bork was rejected, Ginsburg resigned, and Kennedy was unanimously adopted by the judicial committee of the Senate and obviously, he will be accepted by the whole Senate when they sit later on.

I said on page 19 of this document that it is hard to forecast how a Supreme Court judge will act once appointed to the highest court. We have the case of the famous chief justice Earl Warren who was appointed to the US Supreme Court by President Eisenhower. Eisenhower said, "He will be a good judge. He has a strong conservative mind, like me, and he will be a strict constructionist." What happened is exactly the reverse. Warren was a very liberal interpreter of the American Constitution, as we all know. Eisenhower was very surprised at the reaction of Warren once he was on the highest court of the land.

So it is always like that. We cannot foresee in advance exactly where a judge will stand on a very important issue: let us say in the United States, civil rights; or, let us say, in the United States or Canada, abortion; in Canada, linguistic rights; and euthanasia and some other subjects which are so difficult and are very important and delicate matters. But obviously since the judgments of the Supreme Court are of paramount importance in some areas, like civil rights, civil liberties and the division of power, it is very important that both orders of government be called upon to have a say in the appointment of the judges.

So now the system that is proposed by Meech Lake is that the lists are prepared by the provinces and the Prime Minister of Canada selects a person from that list. There is no perfect system. I do not know of any system that is perfect.

In 1971, the Victoria formula—judges were appointed by the Prime Minister and with the consultation of the provinces—the participation of the provinces and, in case of deadlock, an electoral college or an arbitration officer was appointed.

Is it better now under Meech Lake than under the Victoria charter? It is debatable. Now there is no mechanism in case of deadlock to solve the problem. Some people say it is a weakness. Some others say, "Well, it is debatable." Because you see, if you appoint an arbitration college to settle a deadlock, it may mean that the final decision is with the person, the arbitrator, who is not elected. While under Meech Lake, at least the Prime Minister of Canada and the premier of the province concerned are both



elected and they will have to agree one of these days.

What happens if the deadlock continues for a certain time? When the judge is from the common law provinces, I do not see a big difficulty, because there is nothing in the Constitution, there is nothing in the Supreme Court that says that a judge shall come from a province, except in the case of Quebec—three judges from Quebec. But the tradition is that Ontario has three judges, Quebec has three judges according to the law, the western provinces have two judges by rotation and the Maritimes one. If a province is too tough, however, the Prime Minister is not bound by any of those traditions and those conventions.

#### 1440

So it is to the advantage of a province to co-operate with the Prime Minister in the appointment, because if there is a fight between two provinces, the Prime Minister may select a man or a woman from another province. He has a powerful play here. In the case of Quebec, it is a little more complicated because three judges should come from Quebec. He has no choice, because Quebec has a civil system. Still, I think the Prime Minister has a lot of power because he is the one who, in the last analysis, should say yes or no. So I think it is acceptable.

The Meech Lake accord is also talking about the existence of the court, the civil composition, the judicial removal and judicial appointment. All of this does not raise any big problem. Whether we give too much power to the judges—I will come back to that very important question later on. It is true that they have to define very important questions like peace, order and good government, property and civil rights, multicultural heritage, freedom of expression—let us say section 7 of the charter, as we saw last week—it is true that they have tremendous power, but this is not new, you see.

This is the case since we have had federalism in 1867 and the Privy Council in 120 decisions and the Supreme Court in more than 100 decisions have construed our Canadian federalism. On the whole, I think they have done a good job. It is part of our judicial heritage in Canada that the control of the legality of all statutes is within the courts. They are the guardians of the Constitution.

Finally, I should say here that the method of appointment as provided for now in the Meech Lake accord is reasonable. My impression is that the Supreme Court will stay with nine judges, three of them coming from Quebec, and it will

continue to be a court of last resort. If at any time we need, in case of illness or absence, to appoint ad hoc judges, I think I would accept the suggestion of the Canadian bar that we appoint the judges ad hoc from retired judges of the Supreme Court or superior or appellate courts.

The Senate is part of the deal at Meech Lake and Langevin. What is the purpose of the Senate? In any federation, the Senate, that is, the second chamber, represents the states or the provinces or, in Germany, Länder or in Switzerland, cantons. The members of that chamber are elected as in the United States, at first indirectly and since 1913 directly. In the United States they are elected; in Australia they are elected. In some other federations, they are designated. In some cases, Canada and Great Britain, the members of the second chamber are appointed.

The Fathers of Confederation discussed at length the composition of the Senate. Finally, they said: "We will not follow the Americans. We will follow the British in that field. The senators will be appointed like the lords in Great Britain are appointed." Were they right? Were they wrong? The debate has been open for a century. Obviously, the House of Lords was conceptualized for a country that was unitary and not federal. The House of Lords, of course, was conceptualized for a big power like Great Britain, and over many centuries. So it is really British and it fits the needs of Great Britain. But is it good or bad in America? The debate is open on this.

Now we see that many reforms have been suggested for the Canadian Senate. It is on the order paper for phase two of the Constitution. No radical reform has occurred in Canada for the Senate as has been the case in Great Britain under Lord Asquith as Prime Minister in 1911 and in 1947.

We have to remember that the Canadian Senate has the same powers as the House of Commons, except that the government cannot be defeated in the Senate, because there is no vote of confidence, except that the money bills shall originate in the House of Commons and except that now, for amendment to the Constitution, the Senate has only a suspensive veto. For example, if the Senate in Ottawa is voting against Meech Lake, it postpones the adoption of Meech Lake for six months. But if the Commons is voting against, it is finished. So it is a suspensive veto.

The fact is that the Senate has rendered and is rendering a very good and loyal service to the Canadian nation. There is no doubt about that. It does not play the role in Canada that the Senate

has played in the United States, probably because the senators have not used all their powers because they are not elected. That is one theory. But over the years, we have in Canada what we call executive federalism, that is, some form of a government by the Prime Minister of Canada and 10 premiers of the provinces.

For years people have studied and flirted with the idea of a Senate based on the German senate. It was un sujet à la mode I remember when I was on the Pepin-Robarts commission. Everybody was in favour of a senate along the German lines. It was la mode du temps, but that is no longer the case. People are no longer talking about that. People are saying, "If we reform the Senate, we will either say that it will only have a suspensive veto everywhere or if we reform the Senate, it will probably become elected." But it is a big reform, and it would be a wise man who could say when and if this will see the light of the day.

Prime Minister Trudeau suggested in 1978 that half the Senate be appointed by the Prime Minister and half by the provinces. It was one possible reform. The Meech Lake accord is proposing this. The senator will be appointed by the Prime Minister and the Privy Council—but in practice it is the Prime Minister—but from provincial lists. That is, each province will submit a list. There was one, I think, who was appointed a senator from Newfoundland recently.

Would it work? I think so. It is temporary anyway, pending the reform of the Senate. But we never know. What is temporary may become permanent for a while. It depends. I think it may work, because the Prime Minister has all the time to appoint senators. The quorum is very low, so he may take all the time required to appoint members of the Senate. Whether the House of Commons is going to accept the Senate that is going to be elected—this would be a rival at its side. On the other hand, Canadians do not want two Houses that are exactly the same, so we have to find something different for the Senate. But this question, of course, will be debated in phase two.

#### 1450

The spending power has been very much discussed at the federal level, in the Quebec National Assembly and elsewhere, and it is going to be discussed, of course, in Ontario and in the other provinces. Our Constitution of 1867 does not say, strictly speaking, anything about the spending power, except that one section of our Constitution, section 118, says that certain sums

of money will be paid to the provinces by the federal government.

In 1868, when the Nova Scotia government threatened the government of the day, the Sir John A. Macdonald government, that it would secede from Canada—this was one year after Confederation—Premier Howe of Nova Scotia said that the deal was not respected and he was talking about seceding from Canada. The Prime Minister of the time changed the allocations of the sums of money to be distributed to provinces. He asked the law officers of the crown in Great Britain whether it was possible for the central federal government to pay sums of money to the provinces, and the law officers of the crown in London said yes. Of course, they were not a tribunal but they were the law officers of the crown.

In 1937, the Privy Council, which was the tribunal of last resort, handed down a terse judgement on the spending power. The spending power has been defined as follows: the federal government may make payments to individuals, organizations and provincial governments in federal and in provincial fields but the federal authority cannot legislate in the areas of provincial jurisdiction. In other words, the federal authority may give money to universities, but since universities come under provincial jurisdiction exclusively, the federal government may give the money but cannot legislate in the field of education. This is how the federal spending power has been defined. In 1937, the Privy Council said that the federal government may make payments but cannot legislate in exclusively provincial fields.

For over 50 years now, no government in the history of Canada has ever challenged the federal spending power. Even Quebec has not challenged that. This is probably because it is advantageous for the provinces to receive some money. But, of course, Quebec has always said, "We agree with the principle but we would like to delineate this federal spending power." In other words, Duplessis, Jean Lesage, Daniel Johnson, Robert Bourassa and all those premiers of Quebec have always said: "Well, we agree with the principle of equalization payment—péréquation, as we call it in Quebec—but we do not want the federal authority to intervene in provincial fields."

What they have done at Meech Lake and at Langevin Block is this: the spending power will continue. The spending power is even recognized implicitly. It is even implicitly constitutionalized, but what is said clearly in the



Langevin-Meech accord is that the right to opt out of those federal spending power programs is now part of the Constitution. In other words, if the federal authority is spending shared-cost money that the provincial and the federal authority contributed in an exclusively provincial field, for example, education, a province may opt out and receive that money.

I think it is a very good thing because this is exactly what federalism is about. Federalism is a system of government where there is a division of power between a central authority and provincial authorities. But, of course, since we have rich provinces and not-so-rich provinces, we have enshrined in our Constitution the principle of equalization payments in section 36 of the Constitution Act of 1982, which is a very good thing.

But Quebec for one reason or another—we have to understand why—says: “OK, we agree with the equalization payment principle, we agree with section 36 of the Constitution Act of 1982, we are ready to recognize the federal spending power. But if that power is exercised in a purely and exclusively provincial field and if it is a shared-cost program, we want to have the right to opt out, to obtain the money and to spend the money ourselves in that exclusive provincial field.”

As I explain at page 28, between 1950 and 1960, this was discussed in Quebec at great length, elsewhere in Canada, of course, and even in Great Britain. For example, Professor Beetz, Gérard La Forest and Gérard LeDain, who are now three judges of the Supreme Court of Canada who may have to rule on this one day, have written on the theory of the spending power. At McGill University Frank Scott, at Laval University the former Mr. Justice Pigeon and the former Deputy Minister of Justice Elmer Driedger have also written on that subject.

We have two theses on this. M. Louis St-Laurent, the former Prime Minister, Senator Lamontagne, Pierre Trudeau and Antonio Barrette have all written on this very extensively and, of course, today all the constitutional law professors are writing some pages on this very important aspect. But the situation now is this: In Quebec a certain group of jurists say the Meech Lake accord, in the field of the spending power, is acceptable because the right to opt out is only in cases where the spending power is utilized in exclusive provincial fields. It is normal in a federation that the provinces be master in their own house in fields of provincial jurisdiction.

## 1500

Most of those who oppose it in Quebec, say, “Well, the price is too high, because you recognize implicitly the spending power that now is not yet enshrined in the Constitution.” That is what Johnson, for example, and Parizeau would say. They say: “Why do you want to recognize the federal spending power? It is not there; you may challenge it. But now with the Meech Lake accord you accept the spending power.”

I am, of course, of the first theory. I am of the theory that Quebec is right in accepting the federal spending power and that the provinces and the federal authority were right at Meech Lake and at Langevin Block to say, “OK, we recognize the spending power, but we enshrine in the Constitution the right to opt out when the money is spent in exclusive provincial fields.”

The other argument that we hear in the other provinces is that the Meech Lake accord in the field of the spending power may balkanize Canada. I think there is one thing here that has to be said very clearly. First, at Langevin Block on June 3, one clause was added to the spending power. The clause says very clearly that the division of power is not changed by the enshrinement of the spending power. In other words, what we enshrine in the Constitution is the spending power as it exists now in our constitutional jurisprudence, not more, not less.

Some jurists, and I was one of them, have suggested the enshrinement of that clause because it is the only way to reconcile Quebec and the other provinces. Quebec says, “OK, I am ready to recognize the existence of the spending power, provided that you accept the right to opt out if it is an exclusive provincial field and if your program is compatible with the national program.” The other provinces have said: “OK, that is fair enough. You have the right to opt out, but the spending power is recognized, as it is now, and we may use it.”

So I cannot see how this may balkanize Canada. We constitutionalize what is existing now, and what we constitutionalize in addition to that is the right to opt out. But the provinces had that right to opt out, so I think the spending power, with the addition of a clause saying that the division of power between Ottawa and the provinces is not changed—and if it is not changed, it does not weaken the central authority—on the whole, is acceptable.

I remember a discussion we had the other day here in Toronto. Many professors of law from Quebec and Ontario and some other provinces had a discussion on this spending power. Most of

them, but not all of them—I have to be careful—finally agreed that, in the final analysis, this accord on the spending power is acceptable.

The linguistic duality and le caractère distinct du Québec: This is very important and fundamental but not too well understood, in my opinion. It is obvious that the “distinct society” concept, with the spending power clause, has given rise to the most important debate since June last year.

We have to go back to history here. We have to remember that some people have suggested that we enshrine in the preamble of the Constitution the character of the distinct society. Now it is not in the preamble that it is enshrined. It is in section 2 of the accord; it is in section 2 of the British North America Act of 1867. But again we have to remember that there is a clause that was added on June 3. The distinct society and the duality do not change the division of power between Canada and the provinces. This, to me, is fundamental and should be taken into account. That is the first observation.

The second observation is that both the linguistic duality of Canada and the distinct society of Quebec are part of the same article, the same section of the Constitution, and there is an equilibrium between the two.

The third is that there is a return to the concept of the French-speaking Canadians and the English Canadians, as we have done in the past, and I think this is good.

So there is here a big difference between Langevin and Meech Lake. The linguistic duality is not a surprise; it is part of the fabric of our own country and, in my opinion, it is necessary to say that.

This explicit clause gives something to the francophones outside Quebec—they will appear before you, I am told—probably not as much as they would like to have.

Les francophones hors Québec aimeraient avoir plus de pouvoir dans les accords du lac Meech pour que les provinces puissent promouvoir la dualité linguistique dans toutes les provinces du Canada. Et je comprends ça, je suis le premier à comprendre ça. Est-ce qu'on doit amender les accords du lac Meech pour changer et ajouter certains mots? Je peux comprendre qu'on puisse le proposer, mais je pense que les accords du lac Meech donnent tout de même plus de pouvoir aux francophones en dehors du Québec qu'auparavant, puisqu'on dit que c'est une caractéristique fondamentale du Canada. Or, en droit, une caractéristique fondamentale, c'est très fort. Maintenant, est-ce que c'est assez? Là

ils le diront, si c'est assez ou non. Et je reviendrai plus tard sur la question à savoir si on doit prendre le risque à ce stade-ci d'amender les accords du lac Meech.

In Bill C-60 of 1978 we had a clause that was not exactly the same, but to a certain extent we used the expression “the Canadian French-speaking society centred in but not limited to Quebec.” In short, the first part of section 2 is a fundamental characteristic of Canada and is being entrenched in the Constitution.

## 1510

What does the term “distinct society,” “société distincte,” mean? It is debatable, but for most jurists, and I am one of them, the “distinct society” declaration in section 2 is a rule of interpretation. It is not more, it is not less.

A rule of interpretation in constitutional law is very important, but that rule does not change materially the division of power or the Charter of Rights, because my thesis is that the Charter of Rights, being part of the Constitution, is paramount, as sections 91 and 92, the division of power, are paramount. The “distinct society” concept is a rule of interpretation. It may, in case of doubt, tip the scales to one side or another if it is in a grey area. It may to a certain extent, particularly under section 1 of the Charter, orient the charter, but it does not give Quebec an additional legislative power. It enshrines in the Constitution a concept saying that Quebec is a distinct society, but the next paragraph says that this does not change the division of power between Ottawa and the provinces. It means that Quebec has the same legislative and executive power as the other provinces have.

In that sense it may be compared, from the point of view of interpretation, to section 27 of the Constitution Act. Section 27 says, and nobody objected to this in 1982, “This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multi-cultural heritage of Canadians.” The wording of section 2 is pretty close to that one, and that is exactly what we say for the distinct character. So it is a rule of interpretation that may be important in a given case, and we may come back to this later on—I have two cases before the Privy Council on this—but that does not change materially, to start with, the division of power between Canada and the other provinces and does not change the division of power in the sense that Quebec has no additional legislative power.

Section 92 of the British North America Act is the same for Quebec as for the other provinces,



but it may influence the interpretation in a given case, as section 27 has changed the interpretation of the Supreme Court of Canada in freedom of religion. In the Big M Drug Mart case, Chief Justice Dickson said that because of the multicultural character of Canada, freedom of religion in Canada means this and this and this. So it is important, but it does not give additional power to one province.

Is Quebec distinct? Well, the concept of Quebec as a distinct society can be traced back to the Quebec Act of 1774. I think we may conclude that it is distinct because it is the only place in North America where a French-speaking community is predominantly speaking a language that is different from the language of all the other provinces. It is the only province having a civil code modelled on the code of Napoleon, while all the other provinces have adopted the common law system of Great Britain. Even Great Britain itself recognized that in 1774, when the Parliament at Westminster in London reintroduced French civil law in Lower Canada.

To have a civil code in a British colony is something that is distinct. We do not have that very often in the history of the British Empire, the Commonwealth or the British nation. I think it is distinct, and it has been like that from the beginning. So in that sense, it is distinct.

People say: "Yes, but why do you not define the distinct character of Quebec? Why do you leave it open like that?" Then the jurists will answer, unanimously I think, "Well, if we define something in a statute, we are going to limit by definition what the character is." Perhaps they are right. You will say that I am prejudiced, being a jurist myself. I agree. I think the distinct character of Quebec may change a little bit from one century to another. For example, regarding the same culture and the same language, Quebec is exactly the same in that sense. But perhaps Quebec attaches more importance today to linguistic issues than to religious issues. We may see a difference from one century to another. It may be the same thing in the other provinces, but it is certainly the case in Quebec for the school system, for example. So perhaps we are right not to define too precisely what it means.

On the whole, I think we may come to the conclusion that it is really a distinct society, and I will come back to that later on.

People were afraid of that, and the multicultural Canadians, if I may use that expression, and the aboriginal people say, "OK, if you do that, put section 16, with a notwithstanding clause, in the Meech Lake accord," and they did. Well, I

understand that. In my own opinion, it was not strictly necessary, but they did it. They felt that politically it would be a good thing to say that. There is no doubt that section 27 has been referred to by the Supreme Court, and the Supreme Court may refer to the distinct character of Quebec. But again, I do not think it changes the division of power.

We have recognized the right of aboriginal people. We have recognized the two major linguistic communities throughout Canada. With the Meech Lake accord we recognize the distinct society of Quebec. I think we just reflect what Canada is about. Of course, there is the difficulty of interpretation, but I think our judges at the Supreme Court level are used to this.

I have also quoted the opinion of Eugene Forsey, who said that Quebec is different: "It is the citadel of French Canadians." In a way, I think it is true.

Immigration: I do not want to spend much time on this. What the Meech Lake accord is constitutionalizing, is the Cullen-Couture accord that has existed in Canada since 1978.

In conclusion, I think I will say just a few words about centralization and decentralization, because in Quebec, people are, *prima facie*, if I may say, in favour of more and more autonomy. Even in Ontario, if we read the history of Ontario, Ontario and Toronto have always been jealous of their autonomy, and it is quite understandable. But the sentiment may vary from one province to another.

## 1520

I have said a word about the four Prime Ministers of Canada who have been in power for more than 15 years, and all of them of course—Macdonald, Laurier, King and Trudeau—very strongly influenced the federalism of their time, but they differed from one to another. Sir John A. Macdonald was in favour of a legislative union. We all know that. He admitted very frankly that he was in favour of a very strong central government. Sir Wilfrid Laurier was quite different in a way, in the sense that he was against the intervention of Ottawa in the field of education in the Manitoba schools question. He created two provinces in 1905. He changed the subventions to the provinces, section 118. On the whole, he was probably more of an autonomist. I say "probably" because I do not want to have an historical debate. We cannot summarize the life of Sir Wilfrid Laurier and Sir John A. Macdonald in one paragraph. It is impossible.

Mackenzie King ruled for a very long time. In the first decade he was more of a decentralist than

in the next decade when he took power in 1935 and introduced social security. Prime Minister Trudeau lived in a very turbulent and difficult period, as we know. There were the Official Languages Act, the turmoil of 1970, the Victoria charter, the election of the Parti québécois, le référendum du Québec, the patriation of the Canadian Constitution, and finally, the Canadian Charter of Rights and Freedoms. Obviously, he influenced very strongly the federalism of his time. That federalism was vigorous and we have to remember that at that time a government in Quebec City was interested in attaining sovereignty.

Is our country too decentralized? We hear very often, "Canada is the most decentralized country in the world." Yes and no. On paper, our Constitution was very centralized in 1867. The Privy Council decentralized our Constitution. I have put some examples of this on page 41. I do not think we may say bluntly that we are the most decentralized. It depends. In certain fields we are, undoubtedly. In some others, we are not. Without the Meech Lake accord, for example, all senators and judges of higher courts are all appointed by the federal authority alone, which is not the case in the United States which is a federation like us; so it depends.

The Supreme Court of Canada said there is no standard federalism. It is up to each country to adopt the best federalism for its own needs. In the United States, history has shown that la théorie du balancier, sometimes it is centralized and sometimes decentralized. We all remember that Thomas Jefferson in the United States was in favour of autonomy. Alexander Hamilton was for a very strong central government, as Sir John A. Macdonald was. In the long run, Alexander Hamilton won.

In the field of human rights, the winner was Thomas Jefferson with the ideal situation where civil liberties are enshrined in the Constitution. Are our individual rights protected? I am sure they are because, I must say, being a director of a human rights centre, I believe strongly in human rights. I must confess that I believe very strongly in the Canadian Charter of Rights and Freedoms. In my opinion, that Charter of Rights and Freedoms is enshrined in the Constitution and is still paramount. I do not think the character of the distinct society of Quebec will be paramount over the charter. I think it is the reverse; it is a rule of interpretation.

I am of the theory—probably some other professors, Peter Hogg, Professor Lederman and some others, are like that—that the Charter of

Rights, which protects individual and human rights, is still paramount. I cannot imagine that the Supreme Court of Canada will construe, let us say, section 2 on the dualism and the different character of Quebec as being paramount over the charter.

It is the reverse. They will give effect to the Canadian Charter of Rights and Freedoms; there is no doubt in my mind. As they have done for the multicultural heritage of Canada, it may come into play as a rule of interpretation in a case of human rights, but it is not paramount in the sense that the Charter of Rights is in the Constitution. It is not only a rule of interpretation; it is substantive. In my opinion, the charter remains as it is. I think the distinct character is a factual situation and in our Constitution there is much more to be gained by saying it than by not saying it.

I conclude. I have been a bit long and I apologize.

**Mr. Chairman:** That is quite all right. It was most helpful, Professor Beaudoin. Mr. Morin.

**Mr. Morin:** I will ask my question in English. Is it reasonable in your view to assume that any errors, any omissions, any mistakes that are made right now in the accord could be changed after the accord has been ratified? Could we bring in amendments, or is it cast in stone as finished?

**Mr. Beaudoin:** Yes, if we discover an error has been made, I think we may come back and make an amendment.

**Mr. Morin:** How long would that take?

**Mr. Beaudoin:** That is a good question. It may be very fast; it may be long.

**Mr. Breauth:** What a lawyer.

**Mr. Beaudoin:** Who knows the future?

We made a terrible mistake in 1867 when we failed to embody in the British North America Act a formula of amendment. When Canada became independent in 1931—we started in 1926 with the Balfour Declaration; Mackenzie King started to make a federal-provincial conference on the amending formula. In 1931, the British thought: "Gosh, you are independent now. You need an amending formula in your own Constitution. You do not have it." King and Bennett said, "It will not be long; we will find one," but it took 50 years to find it.

It is like reform of the Senate. People say, "When is the Senate going to be reformed?" There is only one answer to that in my opinion: When people really want to do it, they will find a way to do it. It is like the argument about the unanimity rule: "Now, to create a province, you



need unanimity. To amend certain areas of the Constitution you need unanimity. You will never have unanimity."

That is wrong. In 1940, we needed an amendment to the Constitution to give unemployment insurance to Ottawa. We did it. In 1949 and 1951, we needed an amendment for old age pensions. We did it unanimously. There are at least three or four cases where the unanimity rule was not an obstacle to amending the Canadian Constitution because people wanted to do it. It is the will that is important. The formula of amendment is not changed. It is only in certain areas that we need unanimity. The basic formula is still the same: seven provinces and 50 per cent of the population.

### 1530

If we discover a tremendous error, we have to correct it right away. It is a question of opinion, but to me there is not an obvious error. But that is my own point of view. It has been accepted by the House of Commons now and the Senate has only a suspensive veto. The minute it is accepted by the 10 provinces, the Governor General will proclaim the amendment and that is it. It becomes the law of the land. That is the end of it. If we discover we have made an error, we may correct that error by another amendment. It is the rule of seven provinces, except that in certain areas it will be 10 provinces.

**M. Allen:** Je voudrais souhaiter le bonjour au professeur Beaudoin parmi nous, membres du comité législatif, ici à Toronto. C'est un grand plaisir pour nous d'être en présence d'un expert constitutionnel, un représentant aussi du droit civil. Vous êtes le premier représentant de cette perspective de la société du Québec que nous avons eu l'occasion de questionner.

À l'égard de la question du droit civil et du caractère distinct du Québec, je voudrais vous poser une ou deux questions. Premièrement, il serait peut-être important que le comité ait quelques exemples de ce que signifie, pour le Québec, la différence entre le droit civil et le droit commun, parce qu'il y a des aspects du droit civil qui pourraient toucher, pour le meilleur ou pour le pire, les droits des femmes et qui sont donc importants aux groupements féminins au Canada en ce qui concerne le lac Meech.

On aimerait savoir aussi ce que signifie la Charte des droits et libertés de la personne du Québec dans le contexte d'autres débats à l'égard de la Charte des droits et libertés fédérale, et également à l'égard des droits des femmes et des groupements multiculturels. Auriez-vous des commentaires à nous offrir sur ces sujets, et des

exemples, comme je l'a dit, de ce que signifie le droit civil, qui est toujours important au Québec dans ce débat?

**Me Beaudoin:** En ce qui concerne le droit civil, ce qui est arrivé, c'est qu'après la conquête britannique en 1763, les Canadiens de l'époque, les Canadiens français, vivaient sous les lois britanniques, la «common law» et le droit criminel britannique, et ils se sont adaptés au droit criminel britannique très bien. Ils étaient d'accord. Mais ils voulaient revenir aux lois françaises. Ils disaient, «On est habitués au Code civil de Louis XIV et de Louis XV, aux ordonnances de Louis XIV, et nous aimerions bien pouvoir vivre sous un régime de droit civil.» Londres—et je pense que Londres a fait preuve de beaucoup de finesse, c'était intelligent—Londres a dit, «Bon, d'accord, on va rétablir les lois civiles françaises.»

Après ça, le Québec a continué à avoir son droit civil et sir George-Étienne Cartier, quand il est devenu procureur du Bas-Canada, a fait codifier le Code civil québécois en se basant sur le Code Napoléon en France. Le Code civil a été codifié et est devenu une loi en 1866. Sir George-Etienne Cartier avait dit à Macdonald, «Il faudra que dans l'article 92, on dise "property and civil rights appartiennent aux provinces",» parce que le Québec a un droit civil différent, et le Conseil privé a déclaré que l'expression «property and civil rights» dans l'Acte de Québec de 1774 avait la même signification que «property and civil rights» à l'article 92 de l'Acte de l'Amérique du Nord britannique.

Québec tient beaucoup à son Code civil, non pas parce que la «common law» est un mauvais système. Au contraire, la «common law», c'est un excellent système de droit. Le droit civil de France qui a été adapté au Québec et dans 60 pays du monde est également un bon système et c'est une richesse incroyable pour le Canada que d'avoir deux grands systèmes de droit, le Code civil au Québec et la «common law» dans les autres provinces, et c'est une bonne chose. Le Québec veut garder son Code civil parce qu'il est différent de la «common law», parce qu'il se sent à l'aise dans le Code civil. Remarquez que souvent, les solutions sont les mêmes, mais on y arrive par différents chemins. L'esprit est différent.

Cela c'est le caractère distinct du Québec sur le plan juridique. Sur le plan culturel, c'est le seul endroit en Amérique où il y a une majorité de langue française. Alors ça, je pense que c'est vraiment distinct et c'est le seul endroit qui, dans

un avenir prévisible en tout cas, va avoir une majorité de langue française, et la culture également, le système d'éducation, et en ce sens-là, on peut dire que le Québec est distinct.

Mais sur d'autres plans, on accepte l'uniformité du Code criminel canadien; on est d'accord avec ça. On est d'accord avec le droit constitutionnel canadien, et quand il y a eu un référendum au Québec, le 20 mai 1980, eh bien, la majorité, 60 pour cent, ont voté en faveur du fédéralisme canadien. Le Québec disait: «Oui, ça va nous donner un fédéralisme renouvelé». Moi, je pense que les accords du lac Meech, c'est une forme de fédéralisme renouvelé qui reconnaît que le Québec a un caractère distinct. Mais le partage des pouvoirs demeure le même, la Charte canadienne des droits et libertés demeure la même. Moi, je suis aussi attaché à la Charte canadienne des droits et libertés que le sont mes collègues professeurs de langue anglaise; c'est la même chose.

Ce que j'ajoute à ça, c'est que le Canada, qui est un État fédéral, peut très bien reconnaître qu'une province, à cause de son Code civil, de sa majorité francophone, de sa culture francophone, est différente des autres provinces, tout en faisant partie du même pays. Je pense que c'est possible. Je ne pense pas que ça affaiblisse le Canada. Je pense que ça représente le Canada tel qu'il est. C'est cela, le Canada, où il y a deux cultures, il y en a plusieurs mais deux langues officielles, deux systèmes de droit, deux mentalités. Bon.

Maintenant, pour ce qui est de la question des femmes, évidemment, je ne peux pas... peut-être que c'est une femme qui devrait le dire. Peut-être que les femmes disent: «Oui, mais les accords du lac Meech ne nous protègent pas complètement. On devrait peut-être ajouter à l'article 16 que les femmes échappent à la société distincte.» Je suis au courant de ce débat-là. Moi, je dis qu'il n'est pas, en droit strict, nécessaire de le dire, parce que même l'article 16, d'après moi, n'était pas nécessaire. On l'a fait pour, comment le dit-on en latin, «*ex abundanti cautela prudentia*». Alors, on l'a fait pour plus de sécurité. Je pense, et j'espère que je ne me trompe pas, qu'une bonne partie des femmes au Québec croient que le caractère de la société distincte ne leur cause aucun souci. Maintenant, il est possible—mais là, ce serait aux groupements féminins de le dire—que dans le reste du Canada, il y ait des doutes.

1540

So on the whole, the problem is this, you see. I do not think that, strictly speaking, it is necessary

to have the principle of the equality of women and men in section 16, for the following reason. In my own opinion, the character of the distinct society, being a rule of interpretation, the authority of the charter remains complete. It is not necessary to use a "notwithstanding" clause for the Indians nor for the multicultural heritage of Canada, nor for women's equality, because section 28 of the charter says, "Notwithstanding anything in this charter..." the laws apply equally to men and women, so the equality seems to be absolute.

Of course, some groups have said, "We had better not take a chance and we had better stipulate that in the Meech Lake accord." They have. If you have stipulated that for the aboriginal people and if you have stipulated that for multiculturalism, why not for women? I may understand that, of course. I am impressed by that, I must confess. But the problem is, if we do not do it, it may be harmful.

If it were strictly necessary to do it for the two others, then of course, I may understand the importance of the argument that it is necessary also to do it for the others. Because, if you include two groups and you exclude one, it may be harmful for the group that is excluded. OK. I agree with that.

But, if it were not strictly necessary to include the first two groups, and you do not include another one, it will not change anything. So the problem now—legally speaking, I may be quite wrong; the Supreme Court will see if I am right or wrong and they have the final say, except that if we are not satisfied, we may amend the Constitution. The Supreme Court may say: "No, no, you are wrong. They are not protected."

But I cannot see how the new proposed section 2 of the British North America Act, which is a rule of interpretation that does not change the division of power, will be paramount over the charter. I cannot imagine that the Supreme Court will say that.

Of course, if women are afraid that the court may do that, they may ask for the addition of this. But again, if you ask my opinion, I think the equality is protected and I even say that, strictly speaking, it was not necessary to have section 16 in the first place. But now it becomes a purely political problem to say whether we should add them to be sure that they are protected. Legally speaking, I may be wrong, but I think they are protected.

**Mr. Chairman:** Mr. Allen, Mr. Cordiano had a supplementary on that.



**Mr. Cordiano:** Professor, let us take the case, the scenario where you are wrong, in the worst-case scenario, where section 16 somehow grants those rights or elevates those rights, that is in sections 25 and 27.

**Mr. Beaudoin:** Yes.

**Mr. Cordiano:** I am referring back now to the testimony we had this morning from Professor Baines. I am sure you are familiar with what she said.

**Mr. Beaudoin:** Professor Lederman?

**Mr. Cordiano:** No, Professor Baines from Queen's University.

**Mr. Beaudoin:** I think women do not agree internally between themselves also.

**Mr. Cordiano:** That could be the case, but I—

**Mr. Beaudoin:** Because in Quebec I discussed that with certain professors at Laval University and they said, "Well, we don't see any problem." I suppose women disagree between women as we disagree between men.

**Mr. Cordiano:** We will find that out, I am sure, in the days ahead.

**Mr. Beaudoin:** Yes.

**Mr. Cordiano:** But my point here is let us take the worst-case scenario, that section 16 somehow does not include section 28 or any other section of the charter, and those are the equality provisions.

Professor Baines, this morning, suggested that women can be viewed as a cultural grouping, if you will. I asked her what her definition of multiculturalism was and that included all Canadians. I think most of us would agree that all Canadians are considered to be of some multicultural heritage and therefore, we are all included in that section.

**Mr. Beaudoin:** We are all included in that—

**Mr. Cordiano:** Men, women, English, French and whatever other heritage group you have or wherever else you come from. That is the meaning of multiculturalism. So she suggested that indeed you could view women—that there is a cultural grouping there for women. That is, that women may share a set of cultural values and that if you did that, then section 16, in a strict technical sense, would include women's concern about having been included in section 16.

Because, if you view women's groups as a cultural grouping then, under the strict section 16, it could be referred back to section 27 of the charter and that would basically go along with the argument that they are a multicultural group.

**Mr. Beaudoin:** I wonder if they are not afraid of something else. Suppose Quebec is enacting a law in its field, section 92. And suppose, to promote the character of the distinct society of Quebec, there is inequality between men and women in that act.

Then they are probably afraid that the court may say, "Yes, there is inequality between men and women, but we accept that because it is for the distinct character of Quebec." I think this is what they may fear.

OK, but if a judge says that, in my own opinion it is a very bad judgement because equality between men and women, in all laws of this country, federal or provincial—again in my opinion—is guaranteed by section 28. Why? Because section 28 says, and I will read it, "Notwithstanding anything in this charter..." even section 1, even section 15, even section 33, because there is a "notwithstanding" clause in the Constitution. But section 28 says, "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

It is hard to find something that is more equal than that, "Notwithstanding anything in this charter..." So if the law of Quebec—and Quebec is bound by section 28—promotes a distinct society, I think the law will be declared invalid and as encroaching on section 28. I discussed that with some colleagues and they said, "Yes, but a judge in certain provinces said that it is acceptable." In my opinion, that is a bad judge.

## 1550

Is the Supreme Court going to give precedence to equality? Because section 28 is not only a rule of interpretation, it is a substantive rule. It is not interpretation, it is law. Rights and freedoms are equally guaranteed to male and female. It is always possible that a judge may rule that way, but to me, he would go against the wording of section 28 if he says that equality between men and women may be set aside by the distinct character of Quebec as a simple rule of interpretation.

In law, I feel secure. Politically, probably section 16 was added for policy reasons. I can understand why people are knocking at the door of the government again. They say, "If you do that for two others, why not for us?" And they understand that.

Whether they may open the door and add that protection, even if it is not strictly a necessity, it is up to the politicians to do that. I am not a politician, I am a jurist. If you ask me whether it is strictly a necessity, I say no, I do not think so.

If you ask me whether a judge may rule otherwise, of course, I am obliged to say it is possible. Of course, it is possible.

As a matter of fact, we have a court of first instance, a Court of Appeal and the Supreme Court, and this is what a court is about. It is to correct the errors of the other judges. The Supreme Court of Canada is the final stage and it is right because it is the Supreme Court.

I do not think, again, in pure law, that it is necessary. You may say, "But prudence and politically and for all others." I understand that.

**Mr. Chairman:** I wonder if I can put one question, and then I have Mr. Morin and Miss Roberts for questions.

One of the issues that is bound to come up—and we have not really addressed it specifically; you touched on it—relates to the minorities. Assume for a moment I am an anglophone in Quebec compared to a francophone in Ontario. As Charles Beer or Charles de la Bière, I have concerns about the accord and what it is going to do to my rights. Assuming that the accord has become part of the Constitution, how does the anglophone Quebecer fit into the distinct society and how are his rights affected or not affected in your view? The francophone in Ontario, how might his rights be affected, if at all? What are the grey areas in terms of the differences as a result of the "distinct society" clause in terms of those two different minorities?

**Mr. Beaudoin:** I start first with the anglophone in Quebec. The clause says that Quebec is a distinct society. I think the anglophones, in Montreal mostly, are divided. I spoke with some of them and they say: "I do not fear anything at all. I am part of that distinct society." Many of them, of course, speak French and they are involved in French activities and so on. They say, "It is all right with me." Some others say: "No. It gives a distinct character to Quebec, un statut particulier, and this is basically wrong."

I understand that after the Meech Lake accord of April 30, some people might have thought that way. I may understand that. But we have to remember that on June 3, in the middle of the night, the 11 first ministers added clause 24, saying that it does not change the division of power. To me, this is fundamental.

If they are saying in the section and article of the Constitution that the character of the distinct society in Quebec does not change the division of power, it means that Quebec has the same power as the other provinces, not more, not less. It means that Quebec has not legislatively a particular status, but it does mean that in some

areas, the character of the distinct society of Quebec may influence the courts in construing the Constitution. But it will influence the courts not only for Quebec but for all provinces. This is what people forget.

For example, we have two cases of the Privy Council that say exactly that. In the Parsons case, 1881-82, the question was whether insurance was provincial or federal. The Privy Council said that insurance is not stated in the British North America Act, but it is provincial because it is a contract. A contract is part of the property in civil rights. Then it said very bluntly that because Quebec has a Civil Code that is different from the common law of the other provinces, to rule otherwise would be bad for the specificity of the Quebec Civil Code.

That is exactly what a distinct society means. It may influence the court when the court says what is provincial and what is federal. But once they have been influenced, their decision is binding on all provinces. It does not mean that Quebec will have the right to rule on insurance and the other provinces will not have that right. The Privy Council said insurance is therefore provincial, but it is provincial for any province. Any province may rule on insurance. So that is exactly a case where the distinct character of Quebec has influenced the Privy Council.

There is another one. In 1937, after Canada became independent, the question was: "What happens if Canada is signing an international treaty? Who is going to sign and, after the treaty is signed, what are we going to do?" The Supreme Court and the Privy Council said, "It is Ottawa alone that may sign the treaty." For example, the free trade agreement: Obviously, it is the Prime Minister of Canada, the government of Canada, who may sign the treaty with the United States. OK.

## 1600

Now, who may implement the treaty? Ah! That is the question. The answer is that in all federal fields, Ottawa may legislate to give effect to a treaty; in all provincial fields, the provinces may give effect to the treaty. If the treaty is entirely federal, there is no problem: Ottawa is legislating, implementing the treaty. But the Privy Council said—and we have to examine each case, of course—that if the treaty is concerned also or uniquely with provincial matters, the provinces will implement the treaty, will legislate to give effect to the treaty. Then the Privy Council said that if Ottawa cannot legislate in the field of civil law, because civil law is provincial, it cannot do it by entering into a treaty with



another nation and then implementing the treaty in the provincial field. We have to follow the division of power inside and for outside treaties, and then they referred to the Quebec Civil Code.

Those are two examples. Perhaps there are others, but I found two—that is not bad—where the supreme tribunal said, “Because of the character of Quebec, we rule that way.” What does it mean? It means that the distinct character of Quebec may at a given moment influence the division of power.

Can the distinct character of Quebec influence the interpretation of the charter? It may, but it will not change the charter, in my own opinion. We were discussing a moment ago the equality of men and women. To me, it is a fundamental character of our Constitution that men and women are equal. Are we going to change that because of a rule of interpretation? I do not think so. Again, I must say it is my humble opinion—I share that opinion, of course—that it is up to the Supreme Court to say yes or no. So this is for the distinct character of Quebec.

Some English-speaking Quebecers say, “Perhaps the distinct character will be more important than my own individual rights, and then I do not like it.” Some of my good friends in Montreal think that way and some of my good friends think the other way. I cannot imagine for a moment that the Supreme Court will set aside clear-cut individual rights in the name of the rule of interpretation. I cannot imagine that.

Now, for the francophones outside Quebec, the word “promouvoir” is no longer in section 2. I am sure that the francophones hors Québec would like to have more than what we have now, and I understand them, obviously. But I fail to see what is lost in section 2. I think they gained something in the sense that linguistic duality is enshrined in the Constitution and is declared to be a fundamental characteristic of Canada. The word “fundamental” in constitutional law is fundamental. There is nothing more fundamental than the word “fundamental” in constitutional law. Even the nationalists in Quebec say: “Aha! You did not see that ‘société distincte’ is not a fundamental character, but linguistic duality is a fundamental character?” Some people in Montreal say: “Aha! You see now that ‘société distincte’ means nothing? It is not even fundamental. It is a rule of interpretation.”

This is exactly what my colleagues at the University of Montreal have said. They say, “What is fundamental in the Meech Lake accord is the linguistic duality; it is not the société distincte.” So in that sense, my own opinion is

that the francophones are gaining something. I am sure they do not gain as much as they would like to gain; that is quite true. The Fédération des francophones hors Québec, sûrement, va demander plus, there is no doubt. I cannot object to that, of course.

In other words, it is a gain—c’est un gain; je ne sais pas si je peux employer ça—probably not enough, but it is better than the status quo. The fact is that “caractéristique fondamentale,” which is very strong in law, is important, and is important also for the English-speaking Quebecers. If it is important for the francophones hors Québec, it is equally important for the anglos in Quebec, so there is something parallel here.

I know what you will say, finally. People will say, “It is so complicated that we do not know how the Supreme Court is going to construe all this.” Well, it is part of their job. They are there to rule. Take, for example, the abortion case: It is a very, very difficult question. They had to rule on it. Euthanasia: They will have to rule on this. Thank God we do not have the death penalty, so they will not have to rule on that, but that is another difficult problem. Euthanasia, abortion and the death penalty: It is difficult to find anything more difficult to rule on in law, but they have to do it. It is their job, and they will do it.

“Distinct society” is a concept like “multicultural heritage,” like “Canadian linguistic duality,” like “emergency power,” like “peace, order and good government,” like “property and civil rights,” the right to opt out and equalization payments. We have at least a dozen global expressions in our Constitution. Of course, the professors of constitutional law are probably fascinated by that, and the judges have to rule on this. It is not just an opinion; they have to rule on it. But it is part of our system.

You will say, “Yes, but if you give too much power of interpretation to the judges, we are governed by people who are not elected.” That is another debate. That is not the debate of Meech Lake. It has been the debate since 1867. It was the debate in 1982, when we enshrined the Charter of Rights in our Constitution, which, in my opinion, is the biggest revolution since 1867. Of course, the Meech Lake accord is an important document. It is probably the third one that is as important as that.

**M. Morin:** Maître Beaudoin, est-ce que l’entente aura réellement pour effet d’unifier le pays et de ramener le Québec au rang de la constitution? C’est ça qui est le but.

**Me Beaudoin:** Là, évidemment, il y a des opinions divergentes, comme vous le savez. Il y a des gens qui disent: «Bon. Le Québec est lié par la loi de 1982. La Cour suprême a dit que le Québec n'a pas de droit de veto. Donc, légalement, on n'a pas besoin de l'accord du lac Meech.» Légalement, c'est vrai. Le Québec fait partie du Canada, le Québec a toujours fait partie du Canada et qu'il y ait des accords du lac Meech ou non, légalement le Québec fait partie du Canada. Il n'y a pas un juriste qui conteste ça.

**1610**

Politiquement—et ça, je pense, c'est le but des accords du lac Meech—c'est de faire en sorte que le Québec revienne autour de la table de négociation, qu'il soit membre de la famille, qu'il mange avec tout le monde au repas du soir et qu'il se sente à l'aise. Mais c'est une question débattable.

Bon. Au Québec, je pense bien qu'il y a une grande majorité qui est favorable aux accords du lac Meech. Il y a une minorité nationaliste qui dit: «N'acceptez pas le lac Meech. Vous reconnaissez le pouvoir de dépenser, vous liez le Québec et puis ça ne donne pas assez au Québec.» Et puis enfin, il y a un groupe de Québécois aussi qui disent: «Le prix est trop élevé pour avoir le Québec dans la famille.» Bon. Cela, disons que c'est au Québec.

En Ontario ou dans d'autres provinces, les gens disent: «C'est bien beau, mais le prix est élevé.» Moi, je me dis que le Québec a clairement manifesté son désir de continuer à faire partie de la famille canadienne. Il l'a dit clairement. Les accords du lac Meech donnent quelque chose au Québec qu'il n'avait pas.

Est-ce que le prix que le Canada paie pour le retour du Québec est trop élevé? Est-ce que ça va affaiblir le Canada? Eh bien, il y en a qui disent: «Oui, ça balkanise le Canada, ça donne trop de pouvoir aux provinces.» On aurait pu imaginer des accords Meech différents; on aurait pu imaginer que le Québec ait un certain statut. Mais je me dis, c'est tout de même les 11 premiers ministres qui sont tombés d'accord, et moi, je me dis, avec la constitution telle qu'on l'a, même avec les accords du lac Meech et avec une Cour suprême dont le devoir est de garder le Canada ensemble et non pas de l'éparpiller, je crois que les accords, même si ce n'est pas parfait—il n'y a pas de compromis politique parfait; même si j'ai beaucoup de respect pour les hommes et les femmes en politique, parce qu'ils font un travail formidable, il n'y a rien de parfait. Je me dis, les accords du lac Meech ne sont pas parfaits, mais ils sont acceptables; et si on dit non au Québec, il

me semble que c'est mauvais pour le Canada de le faire à ce stade-ci.

Maintenant, je suis le premier à dire qu'on aurait pu trouver mieux, peut-être. Mais vous savez que si on remet les accords du lac Meech devant les 11 premiers ministres et si on commence à l'amender beaucoup, eh bien, il y a des chances pour que ça tombe à l'eau. À ce moment-là, les Québécois vont dire: «Ben, coudon! C'était tout de même un arrangement qui était raisonnable. Pourquoi est-ce que ça n'a pas été accepté?» Alors moi, je pense que ça peut être accepté et je suis confiant que les premiers ministres et la Cour suprême vont trouver le moyen de garder un Canada uni. J'ai confiance là-dedans.

**Miss Roberts:** If I might, professor, I will be brief, but I would like to turn from the content to the process, maybe. It has been suggested to us that maybe a reference could be used to clarify some of the points—indeed, section 16 of the accord. You said that is the Supreme Court's job. It's a dirty job, but somebody has to do it.

**Mr. Beaudoin:** I did not say "dirty job." I would not dare.

**Miss Roberts:** Well, I dared. But they have to do that. What I would like to know is whether it is a possibility or whether it is appropriate for us to be looking at a reference of some type. Is this going to be more harmful than helpful? Is there a way of framing a reference in some way that is appropriate? You seem to say that the accord is there and we should go from that point onward.

**Mr. Beaudoin:** It is always possible for the government of Canada to put a reference case before the Supreme Court and to ask for priority and to ask for an opinion. As a matter of fact, it has been done in the past. It may be done. It may delay, of course, the procedure of ratification of the Meech Lake accord. But if you ask me whether it may be done, certainly it may be done. The provinces may do that before their Court of Appeal and they have done it. The Premier of Ontario (Mr. Peterson) did it with Bill 30, I think, with the financing of school boards, for example.

**Miss Roberts:** My question, though, is that I know it can be done, but what is your opinion as a jurist as to whether or not it is an appropriate thing with respect to this particular accord and the process that has gone on before?

**Mr. Beaudoin:** It is always the same argument. If you open the door for one, you open the door for all the others. It is like section 16. If they had not opened the door for the aboriginal people



and for the multicultural heritage, perhaps nobody would have knocked at the door. But if you do that now for the equality of men and women—and I may understand that—then you play with the Meech Lake accord. It has to be done within three years, and there has already been one year that has elapsed.

My impression is—of course, you will say that is not juridical—that politically it would be suicide if a government went contrary to the principle of equality to establish a distinct society. What kind of distinct society would that be? One where men and women would be unequal? I cannot imagine a Premier doing that, but, of course, you will say that that is political. But politics is very important. Women may defeat a government, obviously; they have a majority. But that is purely political; I agree with you.

I think it may be done. On whether it should be done, I have to be logical and say that I do not see the necessity, unless the Prime Minister or the premiers say, "Well, politically we had better do that because..." But, strictly speaking, I do not see it.

In the case of aboriginal people, section 35 and section 25 are so strong that, obviously, the distinct character of Quebec will not change in any way the rights of the Indians. It cannot change that. If it were a legislative power, then they would be entirely right. Probably they will say that they disagree with me on that point.

**Mr. Chairman:** I have got three final supplementaries: Mr. Harris, Mr. Offer and a very little one from Mr. Allen.

1620

**Mr. Harris:** Actually, I have got one other question, too. By the time we have finished this hearing process—and I do not say it to prejudice my thoughts on it—I think we are going to be tired of section 16. Let me ask you this: Do you know of any jurisdiction or anybody who wants to put any interpretation on the equal rights of men and women other than the one that you are giving us and the one that you think will be paramount there? Women's groups have said they feel they may be in jeopardy by not being specifically mentioned in section 16. You have also said that the Constitution will be amended in the future when there is a will and when people want to amend it. Do you know of or have you ever heard of anybody who wants to put an interpretation on the omission of equality rights in section 16 to say it does not have priority—I do not know all the legal words—or primacy over the charter? Do you know of any?

**Mr. Beaudoin:** Do I know of somebody who would object to that?

**Mr. Harris:** Yes.

**Mr. Beaudoin:** If it is added, I do not object to that.

**Mr. Harris:** No, what I am saying is that—

**Mr. Beaudoin:** Of course not, because I believe in the equality of men and women.

**Mr. Harris:** Women have expressed the concern that the Supreme Court is going to rule that by omission, by not being mentioned in section 16, it was the intention of the drafters that they not have the same primacy. Women have suggested that. I guess what I am asking is, have you ever heard of anybody anywhere in the country suggest that this in fact is their intention in leaving women's rights out of section 16, in other words, not putting section 28 in?

**Mr. Beaudoin:** This would be from the government in Quebec City. I cannot imagine for a moment that to promote the distinct character of the society of Quebec, a Premier in Quebec City will say, "OK, we will go against the equality of men and women." Good luck. It is suicide.

The legal argument is that if it were strictly necessary to include the aboriginal people and the multicultural heritage in section 16—if it were a necessity—and if you do not include the equality of men and women, then you may perhaps say that if you have excluded one and included two, the excluded category has no equality. To that argument, I answer that it was not strictly necessary to include the aboriginal people and the multicultural heritage, so the exclusion is not on purpose. That is the argument. I did not listen to the testimony of Madame Baines. I do not know exactly what she said. Perhaps she would have convinced me; I do not know.

**Mr. Harris:** Let me phrase it this way: Have you ever heard any defence of why it is not in section 16 other than it is not necessary?

**Mr. Beaudoin:** No, I have never heard of any other reason than that one.

**Mr. Harris:** I have not. I cannot imagine that you are going to hear anything else, other than it is not necessary.

**Mr. Beaudoin:** I remember having discussed this with a colleague of mine in my own faculty, a woman. She said, "You may be right, but there is a judge"—I will not name the province—"who said the contrary." I said, and perhaps I went a bit far, that the judge was probably not too good. She replied, "Yes, but it is the judicial power that said that." I said, "Yes, but it is not the Supreme

Court of Canada." Could you imagine the Supreme Court of Canada—we have two women now on the Supreme Court of Canada. They are there, I must tell you, and are strong; they are very strong. Could you imagine that they will accept inequality? Of course, people will say: "Yes, but you are a man. You are not a woman."

My argument is that if I were convinced it was really necessary, I would say, "open section 16 and add that." Rightly or wrongly, but *de bonne foi*, in good faith, I do not think it is necessary. Politically, this first minister may say, "We better not take any chances." They may do it, but if you ask for a purely legal argument, I do not feel the necessity of that, because if you want to protect everybody from every bad judgement, good luck. It will be long.

The problem is important to me because it is not only a legal problem; it is a political problem and it is a sociological problem. Mind you, I stated the other day that we have too many "notwithstanding" clauses in our Constitution. On Bill 30, the Supreme Court of Ontario said that in the given case, it was not necessary to have the "notwithstanding" clause.

As a matter of fact, the example is coming from very high authority. In 1867, the Parliament at Westminster used a "notwithstanding" clause in section 91 and a "notwithstanding" clause in section 92. It cannot be better than that: The two most important sections of our Constitution already have a "notwithstanding" clause. We Canadians legislate as if the Constitution were a statute and we use a "notwithstanding" clause very often.

Perhaps we are overly prudent, but the difficulty of this case is that if you are overly prudent for A you should be overly prudent for B. That is the difficulty and to that I answer, as a jurist, that if you are overly prudent in one case and it is not necessary, you do not have to be overly prudent in another case. That purely reflects the jurist in me. It is not political.

**Mr. Allen:** I want to turn for just a moment to the politics you referred to because in terms of the larger politics of those questions, it has been said, for example, that if you sacrifice Meech Lake, for whatever reason, you in fact weaken the politics of aboriginal rights in Canada because Quebec has moved further with respect to recognizing self-determination of native peoples than other provinces, and therefore, to have Quebec in is to assist the whole process.

What I want to ask you is specifically with respect to women. Coming back to the question of the civil code and distinct aspects of law in

Quebec, is the case strengthened for women in terms of the politics of the question by having Quebec fully in the councils of the nation by virtue of aspects of a civil code that pertain to and might perhaps strengthen women's rights in the country as a whole, just by being there? Are there examples you can give us of the place of women in law in Quebec that perhaps are stronger than in the rest of the country? For example, in my own limited knowledge, I know that the property rights of women were much more strongly and much earlier recognized in Quebec than in the rest of the country. There may be others I am not aware of.

**Mr. Beaudoin:** Yes, that is a good question because the civil code of Quebec has been amended and is going to be amended tremendously in the years to come. The government of Quebec has established a reform commission of the civil code. By the way, women are on the board too. We are very careful. Those women do not fear anything. Of course, we debate the question in Quebec whether the civil code is bound by the charter. If I had to say yes or no, I would say yes.

Does this mean I fear for the equality of men and women under the civil code? At the beginning of the 19th century when the code was made in France, obviously women did not have the equality, but they were not in common law either. Today, we amend the civil code more and more to give that equality. I cannot see how the civil law of Quebec may infringe on the equality of men and women or section 28. You may perhaps have the women here from Quebec to testify on this, but my impression is that the Quebec women do not object to that. On the contrary, they feel more secure.

Is the civil code protecting the equality of men and women more than the common law? I am not a great expert in comparative law, but my impression is that the civil code is certainly not less respectful of equality. If I have to say something, it is at least if not more respectful of equality. Why do I say that? It is because the subject is debated in Quebec and the women who are on those boards would know pretty well. If they do not object, it is because they feel their rights are not infringed by the civil code of Quebec.

People will say: "That is all right for the civil code." Quebec is paramount in the field of the civil code and obviously Quebec is not going to create inequality between men and women because it is political suicide. They may say, "Yes, but in a statute that is not the civil code."



We have the charter of rights of Quebec that says bluntly that men and women are equal and this is paramount over the laws of Quebec. Rightly or wrongly, I must conclude that this equality is respected. I do not fear anything there.

In addition, you have section 28. Section 28 is in the Constitution. It is not only a statute; it is in the Constitution. We cannot use—that is my opinion—the “notwithstanding” clause to get rid of the equality of men and women. This, in my own opinion, would be contrary to section 28. Why? Because section 28 says, “Notwithstanding anything in this charter”—notwithstanding even section 33, which allows you to use the “notwithstanding” clause. If the word “notwithstanding” were not in section 28, then I think they would be quite right. But since the word “notwithstanding” is the first word of the section, I cannot see in law a better way to protect the

equality of men and women unless you use the word “notwithstanding” twice.

**Mr. Chairman:** You said earlier that you had some humble opinions. We want to thank you very much for coming here today and offering a number of perhaps humble, but none the less, I think, carefully thought-out opinions that will certainly add to our knowledge and understanding of the accord which we are trying to grapple with. We are grateful you could spend this time with us and we thank you for being here this afternoon.

**Me Beaudoin:** Merci. C'est un honneur, Monsieur le Président, et je vous remercie de m'avoir invité.

**M. le Président:** Cela nous a fait plaisir.

We will reconvene here tomorrow morning at 10 o'clock.

The committee adjourned at 4:34 p.m.

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Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Clerk:** Deller, Deborah**Staff:**

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:****Individual Presentations:**

Baines, Beverley, Assistant Professor, Faculty of Law, Queen's University

Lederman, Dr. W. R., Professor Emeritus, Faculty of Law, Queen's University

Beaudoin, Gérard-A., Professor of Constitutional Law, Law School, Civil Law Section and  
Director, Human Rights Centre, University of Ottawa







No. C-3

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord



**First Session, 34th Parliament**  
Thursday, February 4, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, February 4, 1988

The committee met at 10:11 a.m. in committee room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Ladies and gentlemen, good morning. We begin our third day of testimony. If I might, I will call Professor Donald Smiley to come forward to one of the seats right in front. Professor Donald Smiley is the distinguished research professor of political science at York University. If I am correct, I think I should also add that for many years he was at the University of British Columbia. I will note that western element as we begin the proceedings.

It is a pleasure for us to have you here this morning. As I think you are aware, we have had two days of testimony and today will mark the third and final day for this week. I think perhaps the best thing is to turn the microphone over to you. If you want to tell us how you would like to proceed, we are in your hands.

DR. DONALD V. SMILEY

**Dr. Smiley:** Thank you very much. It is a privilege to give testimony before this committee. I saw the last hour of yesterday's testimony and Gérard Beaudoin is an impossible act to follow. I have admired him; his lucidity, legal learning and great expansive good humour made him no doubt a very attractive witness.

I propose to read a relatively short statement, which I think has been distributed. In whatever time is left after that, perhaps we can have somewhat of a dialogue elaborating on any of these points or expanding a little and so on.

In general terms, I believe that the Meech Lake accord is an act of constructive political accommodation among the 11 governments and on that basis I am concerned that the accord might become unravellled. Although Quebec separatism is now weak and in disarray, it seems to me likely to recur in some form. When it does, and if the Meech Lake accord has been rejected, the separatists will almost certainly point to the failure of even the limited changes requested by the Bourassa government of the 1985-87 period as proof that any defensible constitutional accommodation between Quebec and English-speaking Canada is impossible. It seems to me

that opponents of the accord do not take this major political risk into account.

I think I could add parenthetically that I feel very much that Ontario has a central role in this whole thing. It was just 20 years ago in November when Premier Robarts broke the constitutional logjam which existed at that time and convened the Confederation of Tomorrow Conference. I think he really was the initiator of the process in which we are still involved. Since that effort, there has been, in successive Ontario governments, a very commendable attempt at playing a constructive role in relations between Quebec and the wider Canadian community.

I want to make a couple of points. There are parts of the accord I do not like, but they are not the points that other people do not like. One of them is what I think is really a de facto constitutional amendment made by executive agreement relating to the appointment of senators in this so-called interim period. One senator from Newfoundland has already been appointed under this new interim procedure. I have some doubts about amending the Constitution, in fact, by executive agreement.

There is another point of the accord I do not like very much. It is this provision for annual constitutional conferences. I would hope that there will be a point when we will not have so much constitutional reform on the agenda, when the Constitution settles down and groups cease to pull the constitutional lever so often.

Despite these objections that I have, and almost anyone who reads the accord has, it is a fairly accurate reflection of the values and interests which impinge upon Ottawa and the provincial governments. I think any attempt to renegotiate the accord in significantly revised terms runs the very great risk that no agreement at all will be concluded.

Second, and this is a personal point, I suppose, I do not support the accord simply because I have a knee-jerk reaction to support anything that the political authorities in Quebec say they want. Ten years ago, I was looked upon as somewhat of a hawk on Quebec. I rejected the then popular idea that we should entrench in the Constitution the absolute right of Quebec to self-determination. I thought that the rest of us should turn down sovereignty-association, the "associa-



tion" part of sovereignty-association as proposed by the Parti québécois and so on.

But it seems to me that these reforms embodied in Meech Lake are moderate and acceptable. They embody what I call Quebec, province-centred federalism, the kind of thrust that has been behind the successive provincial Liberal parties in Quebec under the leadership of Jean Lesage, then Claude Ryan; and twice, Robert Bourassa. This kind of emphasis within Quebec looks to the political authorities of Quebec as the primary defence of distinctively Quebec values and interests, but it believes that these can be effectively safeguarded within the Canadian federal system. I think we should remember in this context that Claude Ryan, as well as Pierre Trudeau, was a leader of the federalist forces in the 1980 referendum campaign.

I would like now to turn my attention briefly to the three clauses of the accord which are the most contentious—the "distinct society" clause, the provision related to shared-cost programs and the provision related to the constitutional status of the Yukon and the Northwest Territories.

I hesitate at this part of my testimony because you have been exposed to three of the most distinguished constitutional lawyers in Canada this week: Bill Lederman, I suppose the dean of Canadian constitutional lawyers, my colleague Peter Hogg and Gérard Beaudoin. So I am going to try to avoid purely legal points. I hope the committee will not pay any attention to witnesses who try to be constitutional lawyers but really are not. Certainly, after the legal advice you have had from these three distinguished gentlemen, you are well equipped there.

The "distinct society" clause: one has had distinguished constitutional lawyers giving contradictory views of how the courts might interpret the provision of the accord recognizing Quebec as a distinct society. There are polar positions. According to one, and I do not think many people have a position quite this extreme, so far as Quebec is concerned, or people and groups within Quebec, the charter rights could virtually be nullified by bringing the "distinct society" position into play.

Then there is the other position, as enunciated by Peter Hogg and, I think, Bill Lederman, that the "distinct society" clause is an interpretative phrase, that is has largely symbolic value and would not, could not and will not be used to override the charter rights in Quebec. I do not want to get into that at all.

Let us look at the matter in a sort of nontechnical way. I think we can say that in the last quarter century successive governments in Quebec have been at least as solicitous of human rights as the political authorities in any jurisdiction in Canada. I see no reason to expect this will change.

#### 1020

It will of course be argued that the purpose of the Canadian Charter of Rights and Freedoms is to restrain governments that act illiberally. The charter is in place for bad times for human rights, not benign ones. Remember, however, that if illiberal measures should emanate from Quebec, if these were to succeed, in the final analysis they would have to pass the scrutiny of the Supreme Court of Canada; and if this body is insensitive to human rights, whether the challenges come from Quebec or anywhere else, we are all in a rather bad way.

One almost forgotten part of the constitution of the agreement is that it entrenches a permanent non-Quebec majority in the Supreme Court of Canada. I would expect, on the basis of past experience and my own judgement, that these non-Quebec judges, as members steeped in the traditions of the common law, with its individualistic sort of connotations and emphasis, would be extremely reluctant to override charter rights in the name of collective values related to the "distinct society."

Historically, back in the 1940s, or particularly in the 1950s, the Supreme Court of Canada turned down a good deal of rather repressive Quebec legislation, "distinct society" legislation if you like, impinging on the Jehovah's Witnesses and alleged communists. They did not even have a Diefenbaker Canadian Bill of Rights and they did not have a charter, but they were able, mainly on division-of-powers grounds, to do that; so I can be reasonably relaxed about the "distinct society" clause.

The second contentious provision relates to future national shared-cost programs. In one sense, the charter gives Ottawa the explicit powers to spend within areas of provincial jurisdiction and under some conditions to impose conditions of expenditure. It does not have that explicit power now. Also, the Meech Lake accord relates only to future programs. It has no impact on such things as the national medicare or hospital insurance programs we have today.

Conditional grant programs, shared-cost programs, have been important and are important in the development of the Canadian welfare state and, I would argue, of Canadian nationhood

more generally, but I would expect these arrangements to be less important in the future than they have been in the past. I do not have any specialized knowledge of the matter and I may get into trouble here, but day care is the only major shared-cost program, it seems to me, that is under discussion. It would be my amateur's judgement that in that field one would want a pretty flexible kind of arrangement that allows for experimentation and so on. In other words, it would be the kind of program where it would be most unwise to start out with detailed rigid national standards.

However, on more fundamental grounds, I think opponents of the proposed new section have a good deal more faith than I have in Ottawa's judgement with regard to these matters and a good deal less faith than I have in the judgement of the provinces, who are after all carrying out their own jurisdictional responsibilities.

The third contentious provision of the accord relates to the provision that new provinces can be created only with the consent of Parliament and the legislatures of all the existing provinces. Prior to 1982, Ottawa, the federal authorities, had the exclusive jurisdiction to create new provinces as long as this did not impinge on the boundaries of existing provinces. Six of the 10 provinces came into Confederation from 1870 to 1949 without the advice or consent of the pre-existing ones. However, this was changed in 1982 in a very fundamental way by requiring that new provinces could come into the federation only with the consent of the Parliament of Canada and two thirds of the provinces having in total half the population of all the provinces.

Although the Meech Lake accord stiffens the requirements for creating new provinces, it would seem unreasonable to me to contemplate the establishment of provinces in the Canadian north in the foreseeable future. The conferring of a full range of provincial jurisdiction on two or possibly three jurisdictions in an area that has in aggregate fewer than 100,000 people and is continental in size seems inappropriate. Unless very large discoveries of natural resources are made in the north, the Yukon and the Northwest Territories will have very limited public revenues to provide inevitably costly services in this huge area. Furthermore, if they became provinces on a full scale and if these natural resources were discovered, they would come under the ownership of a relatively small number of Canadians.

Furthermore, the creation of one or more new provinces would create new rigidities in the

amending formula. It would allow four of the provinces collectively, with an aggregate of perhaps six per cent, seven per cent or eight per cent of the population, to challenge changes in the Constitution wanted by Ottawa and the other provinces.

The status of the political authorities in the north is changing. It has changed rather rapidly in the past generation. Although it is unreasonable to expect new provinces, other federations such as India, Australia and Yugoslavia have provisions in their constitutions in which subnational jurisdictions have different kinds of jurisdiction. It seems to me that is quite an option in Canada, that the Canadian north be constituted with some special, constitutionally protected status other than that of provinces.

I am going to go on to an extraordinarily contentious part of this whole matter, and that is the procedure by which the Meech Lake accord is being put into place. There are some very, I should say extreme things, dramatic statements, made about this. It is said that the accord was concluded by first ministers, all men of course, in a secretive way and that the subsequent discussion of other Canadians, including people like yourselves, is quite meaningless because governments have already made up their minds that there cannot be any changes, except, Professor Murray says, if they discover egregious errors. This word "egregious" has, I think, come into the Canadian constitutional debate from the very large vocabulary of Senator Murray and I think we should kind of return that word to him, and the difficulty with it.

At any rate, it is said it is plain that the accord is being put in place in an arbitrary and even a secretive way. Sometimes, in some of this argument, the present procedure is compared unfavourably with the allegedly more open ways in which the 1982 constitutional amendments were put in place, the amendments that gave us the charter and the new amending formula.

What can we say of this kind of criticism? First, apart from the interim procedure relating to Senate appointments, which I have already mentioned and which I do not like, the governments involved have meticulously adhered to the procedures for constitutional amendment laid down in the Constitution Act, 1982. Unlike the long practice prevailing prior to 1982, the most critical amendments to the Constitution explicitly require the approval of Parliament and all 10 provincial legislatures. Of course, for Meech Lake to come into effect requires unanimous



provincial consent rather than the consent of only nine provinces as was obtained in 1981.

**1030**

Second, for those Canadians seriously concerned with constitutional matters, the issues dealt with at Meech Lake caused no particular surprise. I remember it was one of the points of the Conservative Party and Mr. Mulroney in the election campaign of 1984, the constitutional accommodation with Quebec; and the government of Quebec made public its general conditions for adhering to Canadian constitutional settlement soon after it came to power. The matter was discussed by the national conventions of both the Liberal Party and the New Democratic Party. There was a period of about five weeks between the original accord in Meech Lake and the signing by the ministers of the Meech Lake agreement, or Langevin Block agreement as we are now dealing with it, and in this five-week period there was vigorous public discussion and some changes were made.

Now there is some emerging mythology that the way we got the 1982 reforms was more open. On a personal note, I opposed 1982 on procedural grounds and I accept Meech Lake on procedural grounds. That is a rather unusual position.

It is true that the joint committee of the Senate and House of Commons had lengthy hearings about the resolution that had been introduced into Parliament by the Trudeau government and extensive changes were made in the resolution as a result of these hearings. The proceedings of the committee were not very satisfactory. There were very few expert witnesses. The committee itself precluded expert witnesses. I think there were only three; one nominated by each of the parties.

Many important elements of the resolution received almost no discussion in the committee; specifically, the amending formula and the fundamental freedoms clause, the freedom of speech, association and so on. For the most part, the hearings of the committee were monopolized by representatives of interest groups wishing to extend the protection of such groups under the charter.

Yet the resolution as finally forwarded to Westminster and subsequently adopted, was not primarily a product of the committee but of the agreement concluded between Ottawa and the nine provinces; the 4 a.m. session between McMurtry, Romanow and Chrétien in the little kitchenette up in the east building. It takes its place in Canadian mythology, kind of like Laura

Secord's cow and the last spike. That was where the bargaining was really done and that was where the really final agreement was reached.

Between the conclusion of that agreement and its going to Westminster and being adopted, there was a period of about a month and there was some discussion in the House of Commons and in the Senate, but there was no discussion in any provincial Legislature, no hearing roughly corresponding to the kind of hearing we are having here about Meech Lake.

In general, I do not think the way we got the 1982 reforms, which were much more consequential, was much of a model for participatory democracy.

Third, I want to make the point, and it is a purely political point not a partisan point: I think the Canadians outside of government are not so powerless as some of the opponents of the accord suppose in relation to this agreement. Those who signed the agreement are after all, by definition, successful politicians and they all seem fairly urgent about getting their parties re-elected next time around.

The 1981 exercise is, I think, of great significance here. After the conclusion of the November agreement in the conference centre, there was an enormously vigorous mobilization of native groups, and more particularly of women's groups. Quite frankly, it seems the politicians were just scared and they made very specific changes in the charter, most important a new section 28 relating to the equality of men and women under the Constitution. Therefore, I am really saying to the people who now oppose the accord if they beat up enough of a political dust storm I am quite sure politicians somewhere will listen to them, particularly in those provinces which have not yet ratified the agreement.

It seems to me the Meech Lake accord is a much less radical break with the Canadian past than most of its opponents claim. So far as the matters that have preoccupied Parliament, the federal government, in the last year, it would not seem to me that the situation would have been much different if Meech Lake had been in effect. Such matters would include reform of the federal tax system, pornography, refugee legislation, free trade, drug patent legislation, now perhaps abortion, capital punishment and so on. I do not think those issues would have been significantly affected if Meech Lake had been on the books.

In general terms, contrary to some of the opponents of the accord, the accord does not strip Ottawa of the power to act decisively in respect to a very wide range of matters important to

Canadians as members of a national political community. It is simply not, as Mr. Trudeau asserts, "the fast track to sovereignty-association."

**Mr. Chairman:** Thank you very much Professor Smiley. For a moment there I was not sure whether you were advocating that the groups should come swarming in the door and beat us up. I take it as a rhetorical device. Thank you very much. There certainly are some views and perhaps perspectives that I think are different from some of the ones we have heard and we will start our questioning.

**Mr. Offer:** Thank you very much Dr. Smiley. You have touched on and raised a number of issues which I am sure we are going to be canvassing with you in the couple of moments ahead.

The issue that I want to raise with you is the one that you touched upon in your second paragraph. You spoke about the rejection of the accord in terms of "the separatists will almost certainly point to the failure of even the limited changes requested...as proof that any defensible constitutional accommodation between Quebec and English-speaking Canada is impossible."

What I would like to get from you is your sense, not only with respect to the separatist movement but generally the feel and the sense within Quebec as a whole, as to the impact of rejection.

**Dr. Smiley:** I have no qualifications to speak of that at all. When Mr. Trudeau gave his testimony to the parliamentary committee, he made the statement that there is only a fairly narrow range of the Quebec public that is highly concerned with constitutional matters. I think this is a matter of élites. I do not think the country would break down. I think many of us overestimated the fragility of Canada in the 1960s and 1970s, but I would guess that Mr. Parizeau would have quite an interesting time if this thing should become unravelled. I do not think I would go any further than that. Certainly, I have no qualifications. Ramsay Cook is much more familiar with events in Quebec than I am.

**Mr. Offer:** I guess the concern that I have is whether—apart from those who are involved in the constitutional possibilities and ramifications; I am not talking about that group specifically—the general public basically looks upon the accord, without looking to the ramifications and the specifications of the accord, as a symbol or some sort of a togetherness. You might want to comment on that.

**Dr. Smiley:** Yes, that is very interesting. What meaning has the accord? What are the basic political resonances under this accord? What, in a sort of elemental sense, are the differing views of Canada that supporters and opponents of the accord have?

I think many of the opponents of the accord are really talking about a view of Canada in which Ottawa is not one government among 11 or not even one government with a group of responsibilities that are spelled out, but it is the government which, in the crunch, articulates what I think Mr. Trudeau called several years ago, the national will or national purpose. In fact, I think it is the John A. Macdonald view of Canada.

I think some of those of us who are sympathetic to the accord have a much more federalist view of Canada—I do not like to call it decentralist—a pluralist view of Canada, and I think those are the chords that are being rung on that. I think there is partly an engagement here of very different views of what the country has been and probably should become.

1040

**Mr. Allen:** I appreciate the fact that we are moving today from a constitutional orientation to a more political orientation. I do not know whether our heads will feel more at home in this atmosphere today than in the past couple of days, but in any case, I certainly appreciate getting into that part of the discussion, not to say, of course, there is not a clear interaction between politics and the fine points of constitution-making.

I wonder whether, first of all, we could go back to some of your initial concerns about the accord. From the perspective of Canadian political science in general, could you articulate a little more what your concern is about the growth of "executive federalism"—I think you used those words—which appears to be built into the Meech Lake agreement in terms of the requirement of annual constitutional and economic conferences of the first ministers and so on? We have not touched much on that. Could you just give us a little bit of the history of that or the implicit dangers in it?

**Dr. Smiley:** I cannot speak for any other political scientist but myself. You know, Professor Allen, what academics are like. Certainly, the accord gives a recognition to first ministers' conferences, to executive federalism if you like, that we have not had before. There is the recognition of first ministers' conferences as an important part of our constitutional process; and then in terms of at least the provisions relating to



immigration, a sort of constitutional recognition to a class, at least, of executive agreements that have had no constitutional status; I am not even sure what legal status they have had before.

Now the case is raised, if you put them into the Constitution, who are the first ministers collectively accountable to and so on? That is a difficult one. Are the people in legislatures going to be faced with an increasing number of things where the decisions were really made in Ottawa or by some agreement like this, and the thing is that you are just asked to ratify them and the governments in power say, "Now you cannot change this, because this after all was the process of an intricate process of bargaining and so on"? That to me is a worry. Can you overcome that?

I think things can be done in this process. There was a proposal in the report of the parliamentary committee on Meech Lake for a standing committee of Parliament on constitutional affairs, and I suppose if we have these annual constitutional conferences, that would make sense. Or does it make sense—I do not know—for this Legislature to have a standing committee on constitutional affairs?

One might expect the Premier or the Attorney General or whoever to come before it prior to one of these annual first ministers' meetings and discuss with members of the committee the directions the province would take before he/she got into the bargaining session. I do not know whether that is satisfactory.

**Mr. Allen:** One could observe, I suppose, that it is not just in the institutionalization of annual conferences of first ministers that executive federalism is reflected in the accord; you yourself alluded to the way in which the immigration agreements have come about and now have found themselves a place in the accord. There is the interim arrangements with respect to the Senate, for the consultation of first ministers—again, in effect, with Ottawa—that generates the Senate appointment process and the Supreme Court situation. So in a sense, written across it is a good deal more of the executive presence, if you like, than meets the eye at first blush. Is that not right?

**Dr. Smiley:** I think there are two things there. First, you have constitutionalized, you have mandated I guess, annual first ministers' conferences on the Constitution and on the economy; and then you have, as you say, this process of consultation in respect to members of the Supreme Court and members of the Senate.

As we all know, we have developed this vast, complex process of federal-provincial interac-

tion and the Constitution has said nothing about it, but this extends it and constitutionalizes it, if you like.

**Mr. Allen:** You allude to an interesting possibility, that in the process of what would appear to be a kind of executive, high-level centralism, or concentration of power, the process does allow the possibility of some evolution in terms of legislative committee participation in the process of generating proposals for constitutional change and so on. In terms of your sense of the politics of that process, is that something that is apt to be unmanageable ultimately as a process? What are the dangers down the road in that direction if it were to take that turn?

**Dr. Smiley:** I think this would be a nice question to ask somebody who had been very much involved in this process; that is, somebody who had been a Premier or an Attorney General: "Would your position be just complicated to an intolerable degree if you were not only exposed to people in the other governments but you had to have this intricate process of relating all this to your own legislature too?" There is that responsibility, and I am quite sure some of them at least might say, "In order to interact with other governments, we have to have a fair degree of freedom of action to negotiate on the spot."

I think there are all kinds of possibilities in the field of federal-provincial finance that do not involve the Meech Lake agreement; the federal Breaux commission a few years ago got the parliamentarians for the first time in history into federal-provincial finance, and I think in a fairly constructive way.

**Miss Roberts:** If I might, professor, briefly: it is my understanding that as part of the process we had in 1982 and now with respect to the Meech Lake accord, there has been executive federalism, or whatever you wish to call it, and that we have really enshrined the Supreme Court of Canada as being the final court in the land. Part of their decisions are going to be made on the information that was made available to that executive when they were discussing various things. The judges cannot come up with their particular positions without having some background as to the reasonings and the intentions and what has gone on.

I would like to find out from you, as someone who has been looking at the political scene for a long period of time, has the way the 1982 reform come about hampered the Supreme Court in any way from making appropriate judicial decisions because there are the meetings upstairs? And is it

going to be hampered because of the way the Meech Lake accord came about?

**1050**

**Dr. Smiley:** I am not sure I am completely with you. It is really a question for a jurist. What kinds of things do courts take into account when they make their decisions and, in the context you are talking about, do they take what the lawyers call legislative history into account? Canadian courts, by and large, have been very restrictive about that, although not uniformly.

I do not know. One can say that the Meech Lake accord confers on the courts some kinds of decisions that they might have to make. I am sure you will hear more about this. What does "distinct society" mean? The courts will have to evolve a definition of that. Somebody might tell you that is not the appropriate kind of political decision for courts to make, though they might get into the notion of shared-cost programs and what are national standards, and so on.

I guess one can say that the Meech Lake accord has the possibilities at least of extending the range of courts into kinds of decisions that the courts do not now make. One might take the point of view that we have given the courts enough to do with the charter and that conferring new responsibilities is inappropriate and unwise. I am sure that kind of argument will be made some time.

**Miss Roberts:** My concern is whether there is any process, other than the one we have seen in 1982 and 1987, that might give more background for the judges to rely on that you are aware of or that you would suggest?

**Dr. Smiley:** I am not sure. There is really a good deal of talk now about how we can extend the participation in constitutional decision-making to involve more people than this relatively small number of people who are now involved in it.

I simply do not know. One could have a ratification procedure by popular vote. I suppose that might involve people more. But when I talk to people who are not professionally interested in constitutional matters—even some political scientists, so help me—about Meech Lake, they get a kind of glaze over their eyes. In spite of its potential importance, it is not the kind of thing, at present at least, that engages the attention.

**Mr. Chairman:** Professor Smiley, Miss Roberts, as a supplementary, I think one of the things we have to grapple with in terms of process, as a legislative committee, is that one of the difficulties we face with what we are doing

right now and will be doing for the next few weeks is not so much the way Meech Lake was arrived at, not so much the way the political leaders went through the various steps that they ought to have done in terms of coming to the agreement, but the sense, if not from those who are glazed over but at least from those who do have a keen interest, that somehow there was no discussion, there was no real public debate.

There have been some committees and there will be other committees; but, "What can you folks do anyway because the first ministers have already signed it?" I guess one of the things we are grappling with, apart from the accord itself, is whether there are suggestions or recommendations that we can make about the process. It would appear now that provincial legislatures are to be involved in this whole process that they have not been involved in before.

**Dr. Smiley:** Sure they are. That is right.

**Mr. Chairman:** What sorts of things might we be looking at in that context that would, in effect, perhaps open it up and make it more possible for some of the groups and individuals who feel they have been left out of the participation process?

**Dr. Smiley:** I have not got much to say, beyond the point that it would seem constructive to me to have a standing committee of this Legislature on constitutional affairs. It would have hearings prior to these meetings.

Let me take a very tough line on some of these interest groups. They almost were taking the point of view that the people up in Meech Lake had no mandate. I say to myself, by definition, these fellows who got to Meech Lake were not just any group of unselected Canadians. They were people who had been elected. They were successful political leaders.

I think some of the members of some groups—and I am not going to name any because I would get into trouble—who say, "We represent millions of people out there," are extending themselves a little bit. I am very traditional in saying that—and I am not just trying to be nice to you—in our political system the people who got elected have got some sort of status, as against people who did not get popularly elected.

Therefore, although in a certain narrow sense, I think the premiers may have, I can assume, a particular mandate to do this. These were the people who had run a successful electoral risk. I am convinced, and I think you would be, that if there were subsequent great firestorms somebody would buckle. Somebody may buckle in these provincial governments where the legisla-



tors have—but in answer to your very specific question, I cannot think of very much except a standing legislative committee. It could quite possibly meet sometimes outside Toronto and give interested individuals and groups access to it.

**Mr. Breaugh:** In your submission you gave kind of short shrift to those who have concerns about the shared-cost programs. Is that probably an acknowledgement that it is rare to see any level of government totally fund a program of any kind any more, that almost everything we do is shared by two or more levels of government, that there is a lot of negotiation around standards and things like that?

You are taking the stance that it is basically business as usual, that is now our practice and, in the future, you do not see much change in that. When you stop to think about it, across the country we do everything from building roads to running hospitals and universities and schools and policing and pensions and medicare and social programs. All of those are shared-cost programs. All of them are set to standards which are negotiated—I guess that is the best way to put it—and you do not see much change in that.

**Dr. Smiley:** From our point of view, the Meech Lake agreement does not affect the ones already in place. It does not affect national medicare or hospital insurance, the Canada assistance plan and so on. One might ask, if one gets into a national child care program would these new provisions really cramp Ottawa's capacity to set national standards? Or one might ask, and one cannot know, that if Meech Lake had been in place in the 1950s and 1960s would we ever have got a national medicare or hospitalization scheme to which we are all committed in all parties?

I am not really concerned about that. There is a view that simply being on the Ottawa payroll or simply working out of Ottawa, whether you are an MP or a bureaucrat cabinet minister, somehow gives you a wider perspective superior to somebody working in Queen's Park—

**Mr. Breaugh:** The worldwide vision.

**Dr. Smiley:** —or Quebec City or Charlottetown, but I have been in Ottawa too much to believe that.

When the first of the shared-cost programs started in the years immediately after the war, the provinces were administratively, at least, pretty primitive organizations. For example, provincial departments of health in 1945 were pretty primitive organizations without much highly

developed expertise. I think we are past that now.  
**1100**

**Mr. Breaugh:** Just to pursue that a bit: on the other side of the coin, I would have some difficulty arguing that the federal government, unless it is also going to deliver the program, would have some difficulty setting a common standard across Canada. I have problems with the idea that it would set standards, for example, that would be exactly the same in terms of what kind of a house you would build in southern Ontario, as opposed to the kind of house you would build in northern Labrador. There are obvious differences that have to be accommodated and if you had one common set of standards that applied uniformly across the country in a very rigid way, you would be into something very nonsensical in a hurry.

**Dr. Smiley:** What about the more general standards one has relating to the Canada Health Act, uniform accessibility and so on? I suppose one could think of day care standards in terms—I am not sure what they would be—of the uniform standards of accessibility. I would agree that uniform standards of that rigid nature—at least I have read this and I have been convinced of this—in the United States one of the difficulties in dealing with the urban problems is that there have been very specific decisions coming out of Washington that they try to apply in cities under very different circumstances.

**Mr. Allen:** May I have a supplementary on that?

**Mr. Chairman:** OK, a supplementary, then Mr. Cordiano and Mr. Eves.

**Mr. Allen:** The first part of the supplementary, Professor Smiley, has to do with the question of where this whole concern came from and how it got into Meech Lake in the first place. Of course, it comes out of the politics, does it not, the jurisdictional problems of the country, where you have had massive taxing power at the federal level and capacities to spend, but not jurisdiction to spend in, and the provinces have had the obverse problem.

However one went about defining it in words, in constitutional terms, one would always be going back and forth between those two elements of our jurisdictional problem. Whatever language one used, one would probably politically come out at the same end point. Would that be reasonable in terms of what is done in the country?

**Dr. Smiley:** No. I think there are alternative end points. One might say one could overcome

the problem of Ottawa having more financial resources by a system of unconditional financial transfers. From the federal point of view, a member of Parliament might say, "It is not responsible for us to be ladling out all these billions of dollars that we extract from Canadians to the provinces without any control over what the provinces do."

I think there are many end points that you could have all the way from an almost exclusive reliance on unconditional transfers to what in the American system seems to be almost exclusive reliance on very specific programs with very detailed conditions.

**Mr. Allen:** Professor Hogg said that, as far as he could see, the only clear thing one could say as a result of the phrasing in Meech Lake was that you could not take the money and run and spend it on something totally different. You could not take it for education and spend it on roads. The objective in sight had to be education. But beyond that, it was very difficult to say.

Would that be your opinion, or would you think that objectives really do entail more than that in terms of setting of terms of reference, conditions and so on; as you have outlined, for example, with regard to the Canada Health Act?

**Dr. Smiley:** This to me is almost unanswerable because you are introducing—I suppose in the last analysis the courts would have to make this judgement. I do not know what evidence they would rely upon. I think one of the difficulties with this new section 106A may be that you inject the courts into the executive federalism process from which they have been absent before, in which judicial—they have not much to go on in terms of law or whatever—in which they would not really be very useful. One of the interesting things in this whole world of fiscal and executive federalism is that the judiciary really has not been involved in it very much, and some people say that is a good thing.

**Mr. Chairman:** Mr. Cordiano and then Mr. Eves.

**Mr. Cordiano:** I am going to follow up on some of the questions that Mr. Breaugh and Mr. Allen have been touching on in the area of shared-cost programs. I understand what you are saying with respect to your having more faith than the critics of section 40 under the amendment act, in that you do not have as much faith in Ottawa as some people do in terms of setting national objectives. That is what you have been saying, and I understand that.

On the other hand, it is conceivable to me, through discussing this with some of the expert

witnesses we have had on constitutional law, that one thing Meech Lake does is explicitly recognize federal spending power in areas of provincial jurisdiction. So in a sense, it has increased the federal power by explicitly recognizing it in the Constitution for the very first time. Would you not agree that it does that and goes a little bit further?

**Dr. Smiley:** These are really legal questions. The Constitution now does not explicitly recognize Ottawa's power to spend and to set conditions. There are two cases somewhere in the system now which are challenging Ottawa's power. There is a very powerful argument against this section on shared-cost programs from a Quebec constitutional lawyer, Andrée Lajoie, who is a nationalist and who says this should be unacceptable to Quebec.

However, I think many constitutional scholars would say that even though it is not constitutionally recognized there is so much practice behind it that it really is part of the Constitution.

**Mr. Cordiano:** The recognition of something that has happened over many years, has developed as a result of agreements and arrangements.

**Dr. Smiley:** For the courts to very much involve themselves in the spending power—and these are judicious people—would upset an awful lot of applecarts I think, and interests; that is if they radically challenged the spending power. I doubt if they would do that.

**Mr. Eves:** Professor Smiley, I just wanted to touch on a point with respect to interest groups, on page 5 of your submission. You indicated here today when you were talking to us that you have no doubt that if there are changes required in the accord, interest groups will put enough pressure on government that they will be done.

Indeed, if such changes were needed, would it not be good common sense to amend the Meech Lake accord prior to final approval as opposed to after? Especially with the Premier of New Brunswick hanging out there on a limb, so to speak, not having made up his mind yet and paying attention to these interest groups, as indeed I think he should.

If we, as a committee, and other legislatures, for example New Brunswick, decide that some of these groups or one of these groups or a few of them have some valid concerns and some changes are needed, would it not make sense to make them before as opposed to after?

**Dr. Smiley:** The general answer is no, but I am a little bit—I think this is a good agreement and I think it is a fragile agreement. I am afraid it



will become unravelled. In other words, the government of Quebec has accepted this, the Legislature of Quebec has accepted this. The position of some groups—I think this coalition group on the Constitution said, “We want an agreement very badly but we do not want this one.”

My own judgement, and I may be quite wrong, is that there is not very much room to manoeuvre, that this agreement pretty much reflects what is acceptable to the various governments. It is a complex agreement, and I think that if it is changed, it is starting down a process where the whole thing might become unravelled. But I might be quite wrong on that.

I understand the frustration of committees like this and of interest groups, but it does seem to me that the alternatives may well be something very much like this or no constitutional accommodation at all.

1110

**Mr. Eves:** Just a comment: I think Quebec perhaps is the only jurisdiction in Canada that, in my opinion, has done this properly or appropriately. It held its public hearings and heard from the public and received public input before it decided to sign on the dotted line, unlike Ontario and others.

**Dr. Smiley:** I suppose you can say that. Provincially, I think Quebec governments in the last couple of decades have involved their people in the constitutional process in a way that people in other provinces have not. Again, one would have to throw this one up to an experienced person. Would executive federalism be possible if premiers, attorneys general, ministers of health and so on had not only to negotiate with their counterparts from other governments, but also were under very direct and specific influences from their own legislatures. I still do not know the answer to that.

My biases are all in favour of legislatures. I was just delighted about what happened in the United Kingdom in the last couple of weeks when a very large number of Conservative MPs rejected a three-line whip on this security legislation. British MPs are a very independent group, but the British do not have to wrestle with executive federalism. The Prime Minister has the power to abolish local governments if she does not like the political complexion of them. Canadian prime ministers do not have that.

**Mr. Chairman:** Professor Smiley, I think Mr. Allen noted earlier that this morning we entered into a world that maybe we are somewhat more comfortable with, that of political science, dare I

say, than for what is to come, history. Your comments and frankness are much appreciated. We thank you for joining us this morning.

I call on our second witness this morning, Professor Ramsay Cook of York University. You have received a copy, exhibit 20, of Professor Cook's text. We have some extra copies if, inadvertently, any one of us has left his copy at home and the clerk can pass them out.

Professor Cook, we are delighted you could join us as well this morning. I was wondering whether at the beginning I would have to declare a conflict of interest, having submitted to you over the years a good number of papers both as an undergraduate and a graduate student. I am always reminded of the compassion you showed when you handed those back. Perhaps students always dream of the day when ultimately one of their professors will finally be presenting a document where the student then is able to peruse it and ask questions.

I am sure that in the next hour or so we will be able to go through this with you. I might add, for members of the committee, that Professor Cook has had a very long history dealing with Quebec, dealing with relations between French and English Canadians, and I think this whole perspective and that background will be of interest to us as we meet with him this morning. Without further comment, I will let you proceed as you would like.

#### RAMSAY COOK

**Mr. Cook:** I have given you all your grades, so I do not think there is any conflict of interest. You can treat me as rudely as you like or as rudely as my colleague, Professor Allen, used to do when he reviewed my books.

I thank all the members of the committee for giving me some of your time. I have sent you a rather long brief. I hope you have been able to read some of it. It is not my intention to go over it with you in any detail, but to say a few things surrounding it and then to enter into the process which has always been the most interesting one for me anyway, and that is discussion.

I want to say one or two things which are not in my brief. I hope that is acceptable to you. Of course, they are matters about which I would be glad to try to answer questions as well.

I want to begin by associating myself with my colleague, Professor Hogg, and I think some other of the witnesses before this committee, at least as I read Professor Hogg in the paper, in saying, as I am sure many of you agree, that I think the process by which we have arrived at this

particular agreement—I do not think the processes we had before this agreement were perfect either—is not a satisfactory one. I think that for 11 premiers and one Prime Minister to meet twice in camera and come out with an agreement of this sort and to represent it to the Canadian people as a fait accompli is simply not a good way to arrive at a constitutional decision, because these are matters which deal with the very fabric of Canadian life.

I do not mean by this that they should have met under cameras all the time either. I know some of these meetings must take place in camera, but I think an agreement was arrived at for which few, if any, of those leaders had a mandate.

It is not that part of the process that worries me alone, however. It is the part of the process we have become engaged in subsequently, and I think Mr. Eves' question was directed to this with the last witness. Once the agreement was arrived at we had a lengthy parliamentary committee in Ottawa, but the committee began by being told that no changes could be made. I think it was rather frustrating for people who felt there were some changes that could be made to make this a better agreement.

Egregious errors were said to be correctable, but the person who said they were was the person who was the one who would judge what was egregious and what was not, which did not seem to me to be exactly a fair game. I have to say that I regret that I read in the *Globe and Mail* on January 26 that the Premier (Mr. Peterson) of this province has adopted exactly the same view, that you people can sit and listen to us people, but in the end the agreement will stand as it is. I think that is unfortunate. I think this is not a good way to make what seem to me to be fundamental and in some cases radical alterations in the constitutional structure of Canada.

I think it is especially regrettable if it is to be a precedent for that section of the Meech Lake accord which calls for an annual meeting of the Prime Minister and premiers on the Constitution. It seems to me that proposal, in itself, is a difficult one, but if it is also to be conducted in this manner, we have what Professor Smiley called "executive federalism" absolutely run wild, with the roles of parliaments and legislatures reduced to a level which is really quite extraordinary, and I believe unacceptable.

That annual constitutional meeting is going to be the kind of meeting in which virtually every subject one can imagine in this country will become an issue to be put forward as a constitutional matter. Here I want to associate

myself with both John Whyte, professor of constitutional law at Queen's University, and President Harry Arthurs, the president of my own university, both of whom have expressed great reservations about the possibilities of executive federalism, as it is called, arising to that level.

It is already true that under our Constitution, the legislatures and the Parliament of Canada are limited in quite important ways by the Constitution itself. Increasingly, they are limited by the decisions of the Supreme Court, as we know from the Morgentaler decision last week. It seems to me that there is now the possibility that they will be further limited if the sort of precedent that was set by the Meech Lake agreement is allowed to be continued into constitutional decisions in the future.

## 1120

I suppose I would be less unhappy about this procedure if I was of the opinion that the Meech Lake-Langevin Block accord was a perfect one or even a good one. It seems to me there are some serious errors in it which would prevent me from describing it as perfect and perhaps even from describing it as good.

My colleague with whom I associated myself, Professor Peter Hogg, in his recent annotated version of the Meech Lake agreement says—I suppose this is why he is strongly in favour of it—"For the first time in Canadian history, an answer has been provided to the question: what does Quebec want?" That simply is not true. As a historian, I want to state to you categorically that it is not true. Indeed, on Professor Hogg's own showing, the Confederation arrangement of 1867 answered the question, "What does Quebec want?"

Professor Hogg himself argues that the Canadian federal system was the consequence of Quebec's demands. He then goes on to suggest that there were a certain number of others. It seems to me that in the 120 years since Confederation, what Quebec wanted has frequently been listened to and agreed to.

It is true that we had a series of requests from the new Quebec government that have been answered in the Meech Lake constitutional accord, although, as I think you will see in my paper, what Quebec asked for both in the Liberal Party's program and in the initial statement of Mr. Rémiillard, was in one important case at least less than the Meech Lake agreement agreed to, in that the Quebec government asked that the concept of "distinct society" be placed in a preamble to the Constitution and it has in fact turned out to be an interpretative clause. Since



this agreement was reached in an in camera conference, we have no real idea why that, quite significant change I believe, took place.

I think there are other problems in this agreement. You have probably heard of them from other witnesses. I think this agreement has made constitutional reform, especially as it relates to the Senate, more difficult than previously. It has made the admission of new provinces more difficult than previously. It made no progress in the important area of aboriginal rights. It is vague on the subject of what the limitations on the spending power are. I happen to be in favour of a limitation on the federal spending power, but I would like to have an answer to the important question of who will decide if a program or initiative is compatible with national objectives. Will it be the federal government? Will it be a federal court? Will it be, as Mr. McKenna suggested before becoming Premier, a conference of federal-provincial ministers? It seems to me that is a very important question.

As I have said in the brief I presented to you, my principal concern is about the vagueness of the concept "distinct society." It is not that I have ever doubted that Quebec is a society which is different from others in many important respects. Nor is it that I have ever doubted that the Canadian Constitution, beginning in 1987, recognized that fact. I outlined in my paper some, if not all of the ways that this was so. Nor do I doubt that Quebec remains in some important respects a different society.

It is not, therefore, the idea that Quebec is a distinct society that I object to, but the failure of the leaders of this country to specify more explicitly what precisely is meant by that term. It seems to me that a matter of such fundamental significance to the country is a matter for politicians to decide upon and not for judges to decide upon. I think what judges will decide about the meaning of this term is utterly unpredictable. Once again, I refer you to the decision last week in the Morgentaler case.

We may recall what the Minister of Justice said at the time of the passage of the Charter of Rights about the implications of section 7 of the charter. He said it would not lead to the overturning of the abortion law when in fact last week it did precisely that. What ministers of government say about what courts will decide is of no more significance than what I say, and I think that is rather limited.

Professor Hogg, in his commentary on the accord, begins with the statement, "It is not

...easy to define the characteristics that make Quebec distinct...." That I agree to. He then goes on to say, however, that in addition to language and law—which we know are distinct aspects of Quebec society—"Quebec's distinctness finds expression in a host of public and private institutions that are unlike their equivalents in the other provinces."

I think it would be helpful to the rest of us if some of those institutions were named by those who support the accord and if it was explained why those institutions require some special constitutional protection. I think that kind of general explanation will only lead to another long debate, both another long political debate and a long legislative debate, about what the meaning of this term is.

Professor Hogg, and I believe the supporters of the Meech Lake accord in most parts of English-speaking Canada, believe that the term is what Professor Hogg calls symbolic or hortatory. If you read the speech of Premier Bourassa that I quote in my paper, you will discover that Premier Bourassa has a rather different view. He says it consolidates the powers Quebec already has and will permit Quebec to gain new ground.

If you read most of the commentary on this subject of the Meech Lake accord in the province of Quebec, you will see that the debate turns on the question of whether or not it should be clearly defined, thus to give Quebec increased powers, or whether it should be left undefined so that Quebec can gain increased powers through court decisions.

My point is that I think it is dangerous to leave a section of the Constitution as vague as this because it will lead to misunderstanding. I think it will lead to a return to the kinds of debates about vague phrases that we had in the 1960s. It seems to me we need a clear definition of the meaning of this term.

We are, for example, given a variety of different views as to the impact of the "distinct society" clause on the application of the Canadian Charter of Rights and Freedoms, not just on equality rights for women, although that is very significant and has been spoken of a good deal, but potentially on other areas of the charter as well that in my view could lead to the qualities of citizenship in Canada being different in different parts of the country, which seems to me to be unacceptable.

Even though you have already in effect been told so by the Premier, I would urge this committee to take the view that this is not a final

accord, that there is the possibility of reopening, discussing and attempting to clarify some of those matters which have as yet not been made clear enough. I think this committee should urge the present Premier of the province to continue the role that his predecessors, Mr. Robarts and Mr. Davis, took in adopting a national view of the responsibilities of Ontario in the matter of the Constitution.

I do not see why it cannot be changed. Mr. McKenna, before he became Premier of the province of New Brunswick, pointed out to the parliamentary committee last summer in Ottawa that the 1981 parliamentary committee brought in some 65 amendments, including guarantees for the protection of the rights of the mentally and physically disabled and amendments offering aboriginal rights.

It seems to me, therefore, that this constitutional accord could be reopened and that some of those areas which are of serious concern to various groups in the country could once again be discussed. I am not urging you to urge that the Meech Lake accord be rejected. I am simply urging you to take the view that it is still possible, in a country where rational discussion about the Constitution is almost a national sport, to continue to play the game and to try to get a better agreement than the one we have.

**Mr. Breugh:** I want to pursue something you spoke of in your remarks today. If I look at this accord, I do not find it distasteful, to put it as nicely as I can. When I think about what might happen because of the words that are used, because of the vagueness that is in parts of it, that is when I begin to get concerned.

The larger concern I have and one that I think we are somehow going to have to deal with is that in this country we have always used a British parliamentary model for government. We have not had much of a history of establishing public policy by means of litigation as the Americans do. Much of what I dislike about the American system, frankly, is simply that. The distinctions between levels of government are very clear and rather rigid, and the ability of everybody under the sun, by means of litigation, to really thwart public policy is regularly used.

1130

Can you give us some kind of assessment of how far down that road we will be going with this kind of accord? I am a fan of the American system. I think it has many virtues, but its greatest single fault is the ability of anybody out there to get a lawyer, go to court and argue that his constitutional rights are being violated, so

that the whole world has to stop until the court decides. Are we going down that road with this accord?

**Mr. Cook:** I think, sir, the Canadian situation has always been one where, since it has a Constitution and a division of powers in which courts have played an important role, it is not a unitary state, nor could it be. As we know very well from the earliest decisions of the judicial committee of the Privy Council in the 1870s and 1890s, which led to a fairly high degree of decentralization, the Canadian Constitution—you know all this, let me not give you the first-year lecture, you know it better than I do—the courts have always played a very significant role.

I think, with the introduction of the Charter of Rights, it is obvious that the courts have been given an increased role and, on the whole, I am a supporter of the Charter of Rights. I think it is a good document, although some parts of it perhaps are as vague as some of the things that I have been criticizing this morning.

My answer to your question is, yes, I think we are moving considerably in that direction, and not to repeat what I said before but I think the Morgentaler decision is a clear example of the willingness now, or the sense that the Supreme Court judges feel a responsibility to make decisions which are on rather broad grounds. I think we have now decided, some of our political leaders have decided, if they cannot solve a problem, to give it to the courts and let them solve it.

I think we are moving in that direction and I think this accord takes us further in that direction, particularly, with respect to the matter of distinct society, because, given the fact that it is so undefined, it seems to me that in all the areas in which, over the course of the last 20 years, the government of Quebec has been anxious to increase its authority, it will now use that clause in an attempt to argue that its distinctness necessitates that it have powers in certain new areas.

Claude Morin, the former Minister of Intergovernmental Affairs, in an interview he gave on CBC's Sunday Morning, on May 31 last year, said precisely that. If he were again to be Minister of Intergovernmental Affairs in the government of Quebec, here is an area of vagueness that could persistently be used to attempt to argue for an increasing area of authority.

I think this very fundamental question and its impact upon the Charter of Rights—and I think it is an open question what that impact is, because



there are differences of opinion among legal scholars—are the questions that the court will now be asked to decide. To recapitulate, I think in a federal system it is inevitable that the courts make certain decisions. I do not think it is inevitable or necessary that they be given all of these large decisions.

**Mr. Breagh:** I think for those who accept the accord as is, part of the reason they can do that is that it has never been critical before that there be precise definitions and agreements of this kind, because nobody could go off to court where a court would rule. But it now raises the very distinct possibility that, if you lose the political argument, which has normally been our decision-making process, if someone does not like the interpretation that the provinces put on national standards for a particular program, they may now be able to litigate that. In other words, they could lose the political argument but they have a second, more powerful recourse of going to court and really putting a stymie to the political process as we know it.

The hesitation and the apprehension that I have around this accord is that in the parliamentary context I know, this is not dangerous. But I am a bit concerned that we may be going into a parliamentary process that none of us is familiar with, and perhaps the precise definition of words that are used in this accord may come back to haunt us. We are comfortable with that language as Canadian politicians, because that is traditionally the way we have resolved these disputes. But if there is another shoe going to be dropped on us a year or so from now, we probably should learn about that now.

**Mr. Cook:** I could not agree with you more. I think, if you look at the discussion even in Quebec, but also across the country, what it is that the government of Quebec is being given the role to preserve and promote, what precisely is it? Professor Hogg argues in his book that, since the Legislature of Quebec is also given the power to preserve the duality of Canada, the term “distinct society” covers both English and French in Quebec, but that is far from clear in the debate that has taken place in Quebec.

I quoted in my paper to you Premier Bourassa’s statement in which he said “we have for the first time” been given the power to promote the “French character of Quebec.” So there is not even an agreement, in my view, among the people who put this accord together, about whether Quebec’s distinctiveness is simply its

French-speaking majority and English-speaking minority.

Indeed, a leading constitutional lawyer in Quebec whom I quote in my paper said that clause 2 covers French, English, aboriginal peoples and multiculturalism as well. In fact, it says nothing whatsoever about multiculturalism or native peoples, although later on in the agreement there is a reference to that.

While I am on this subject, it seems to me that it is really unfortunate that in this other aspect of clause 2, in which the fundamental character of Canada is described as being French and English, that the fundamental characteristics of Canada, the legislatures and the Parliament of Canada only are given the role of preserving fundamental—not promoting but only preserving, and governments are given no role.

Were I a Franco-Ontarian, I would be deeply distressed by the fact that my part of the Canadian duality was not something that the government of Ontario was given the power to promote as well as to preserve. If I were a Franco-Albertan, where I cannot even ask a question in the Legislature in French, I would be outraged. In fact I am.

**Mr. Cordiano:** I want to add a supplementary. I understand what you are saying, Mr. Cook, this vagueness, the whole question of what it is that you mean by a phrase like “distinct society.” However, the difficulty I have is that there are other terms and other concepts which are all over the place in our Constitution. In fact, we are introduced in the Constitutional amendment passed in 1982 to such as terms as “fundamental justice,” “free and democratic society.” These are all terms that are rather vague and left to the courts to interpret in the best of times. I think those are concepts that have been introduced in the past.

The difficulty I have is that we have always dealt with vague terms and phrases that have been put in constitutions and then left somehow to the courts to decide. Those things may become unravelled over time but, certainly, we have always gone through an appellate type of system to determine when there are conflicts, when there are controversies.

**Mr. Cook:** I agree and I do not think it will ever be possible to have a Constitution in which everything is so absolutely precise that all of us will agree about its entire meaning. It does not follow from that, just because we have imprecisions in the past, that we should have more imprecisions now. My own upbringing in these matters of the Constitution is to say that the most

vague phrases were "peace, order and good government" and "property and civil rights." We know the consequence of that was, through the decisions of the courts, that when the Depression came in 1938 the federal government was largely emasculated of any power to deal with the problems that existed.

That does not seem to me to be an argument in favour of not trying now to bring more precision into these particular clauses. I think it is impossible ever to be absolutely precise but I think that precision is always preferable to imprecision wherever it is possible. Frankly, I do not think of it as impossible in this case at least to move in the direction of some greater precision.

When I read, as I have read, both the debates in Quebec on the subject of distinct society and the commentaries of my academic colleagues, I have come to the conclusion that the principal preoccupation is with the matter of language. It would seem to me at least possible to argue that if some greater guarantee were given to the government of Quebec about the matter of its control over language, there might be a willingness on the part of that government to go back to the position it originally adopted, which was to put the "distinct society" clause in the preamble, and not as an interpretative clause.

**1140**

I think, in a sense, what Quebec is asking for in the matter of language is to be a province like the others, that is to say, to be able to control its language policy. That seems to me to be, within certain kinds of limits, a perfectly reasonable demand. But then after that, I think we have to say: "Well, what else does 'distinct society' mean? If you people are using the term, please tell us what it means." It is an ideology, it is not a reality. That is what the problem is.

**Mr. Cordiano:** Sure, but I go back to what I was saying, that we always have to refer by some other means to defining exactly what this term means. For example, we have had discussions over the past number of years about exactly what multiculturalism means. It may mean one thing to you and another thing to me. It is a very vague concept, and it is still evolving as to what exactly it means in this country.

We can sit here and argue until we are blue in the face about what exactly it means. It may mean one thing to me and, certainly, I have very precise ways in which I define that term. But I may come to you—and I hear the word "multiculturalism" used in all kinds of contexts which seem improper to me. People do use that term in

many different ways, and it is in our Constitution.

**Mr. Cook:** Yes, but, Mr. Cordiano, I beg to point out to you, with all respect, it is in our Constitution, it is there, but no government, provincial or federal, is given the responsibility to preserve and promote it. What is says in the Constitution is that the Charter of Rights will be preserved and enhanced in the light of multicultural rights. It is an interpretative clause.

**Mr. Cordiano:** Right.

**Mr. Cook:** "Distinct society" is an interpretative clause, but "distinct society" is also what a government of Canada, namely the government of Quebec, is given the power to preserve and promote. With all due respect, I think that is very, very different.

**Mr. Offer:** I have a supplementary on that point. I do not want to oversimplify, but you have indicated that your concern is that a precision in the definition of "distinct society" is not there for those to determine whether they are in favour or against the accord in terms of its ramifications.

I question whether your way in which that would be cured is, in fact, a realistic way. Indeed, the definition of "distinct society" seems to be being referred somewhere for some sort of a definition, but does it not in many ways rather take its definitional qualities from a particular context of a question posed before a particular issue and how that phrase would be interpreted in the light of a particular issue?

If that is the case, even taking for the moment your concern, how could we even rely upon a naked definition of "distinct society" in terms of how that particular phrase will be used with issues in the future? How would even your particular proposal help in any way?

**Mr. Cook:** If I understand your question rightly, sir, it seems to me that it would be answered in this way. If the precise meaning of distinct society was once set down, it would be reasonably clear from that what powers, if any, were attached to it.

In 1867, Quebec was declared to be a province, and the Constitution of Canada set down the powers of that province. In 1986, Quebec was declared to be a distinct society. I am asking to know what the implications of being a distinct society are that are not already there when you are declared to be a province. In terms of the Constitution, what is the difference between being a province and being a distinct society? That is really the question I am asking.



If being a distinct society requires that you be allowed to appoint diplomatic representatives abroad, let us hear it. If distinct society means that you be allowed to have your own manpower retraining policies, let us hear it, as we have heard in this constitutional accord that Quebec needs some special powers in the field of immigration. It has been defined in immigration, it has been defined in language, it has been defined in law. I am simply asking, what else? Is it absolutely open-ended or is it, as Professor Hogg says, meaningless?

**Mr. Offer:** I guess my question to you in response is, if, as you have already admitted, it is merely an interpretative provision, is it not proper to accept that, being an interpretative provision, it ought to be interpreted in accordance with a particular issue which is brought before the court, which would of necessity exclude a naked definition at this point in time?

**Mr. Cook:** I am sorry if I misunderstood your question the first time, and I did. My proposal is that it not be an interpretative clause. My proposal is that it be removed and placed in the preamble of the Constitution and we could put everything else in the preamble too, the multicultural nature and all of these things. We can eventually have a constitutional prologue that is as long as that of the Indian Constitution.

But remove it as an interpretative clause, put it in the preamble and set out specifically what the Quebec's distinction is and what powers follow from that. That is really what was done in 1867. Quebec said it had a different legal system, and the Constitution of 1867 says in matters of the common law that Quebec is different. It was agreed that Quebec had a different population makeup, so that certain language provisions were applied to Quebec.

I think that was a very good way of going about it. I think we have moved away from that. We have moved to the position of saying: "Well, here is this wonderful phrase, 'distinct society.' It is, as our legal scholars say, very hard to define. Let the judges tell us what it means."

**Mr. Offer:** But I imagine the concern is that if it were not moved into the preamble, would your reservation still hold if it remained as an interpretative provision?

**Mr. Cook:** I think that I would be prepared to argue that any step in the direction of greater precision would make me happier than I am now.

**Mr. Offer:** Keeping in mind that if we move the "distinct society" clause to the preamble, we might be inviting the same type of criticism that,

for instance, the aboriginal peoples have indicated, that it was mere window-dressing.

**Mr. Cook:** Professor Hogg tells us it is window-dressing. He says it is hortatory and symbolic.

**Mr. Offer:** I would rather deal with your concern.

**Mr. Cook:** My view is that we do not know what it is.

**Mr. Offer:** OK.

**Mr. Cook:** OK? And that is what is wrong with it.

**Mr. Allen:** It is a pleasure to have Professor Cook with us this morning and not to be engaging in a reviewing capacity this morning, but to be engaging in some discussion.

First of all, partly for my own benefit and partly for the committee as a whole, I would like to know what the really substantial difference is in your view between having interpretative clauses and having preambles. My sense of what preambles tend to do is to set an overall direction for the document. In that sense, they are broadly a compilation of interpretative phrases, if you like. What substantially is the difference between putting something in a preamble and putting it in interpretative clauses in the body of the act?

**Mr. Cook:** I think you would probably have been better off to have asked that of Professor Hogg. I am not, as you know perfectly well, an expert in legal and constitutional matters of that technical kind. My understanding of this, having discussed it with some people who are knowledgeable, is simply that a preamble is essentially descriptive and that an interpretative clause mandates the court to say that when you are making a decision, you must take this into account.

Existing in the substantive part of the Constitution makes it mandatory for the court to take this into account. It is very specific, whereas my understanding of a preamble is that it is purely descriptive. It is not that it is ignored, but it is purely descriptive. It seems to be absolutely clear that the understanding of the Quebec government in this matter is as I have presented it. If you read the Premier of Quebec's statement that I quoted, he says and he underlines and he repeats that with this clause as an interpretative clause, the whole of the Canadian Constitution and the Charter of Rights must be interpreted in the light of the clause.

I think that it is a difference that is certainly believed to represent a significant difference by those people in Quebec who adhere to this

agreement. I frankly believe that the fact that it had moved in the Quebec requests from a request that it be put in the preamble to transforming it into a statement about interpretation, was precisely because the Quebec government believes that this is what increases its authority, that by that very move its authority over language matters is substantially increased.

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**Mr. Allen:** So you are suggesting that the first effect of putting it in the preamble would be to weaken the concept and weaken the impact of the phrasing with respect to the weight that "distinct society" would carry in the Constitution as a whole? That would weaken it.

**Mr. Cook:** Yes sir.

**Mr. Allen:** Is your concern fairly heavily influenced by the phrasing of the clause also in the way in which other governments are given only the right or the power to preserve the qualities described in the "distinct society" section, and therefore only the province of Quebec is given the power to promote with respect to the distinctiveness of Quebec? Your belief is that should also be a power of the federal government to not only preserve but also to promote that fact?

Is your concern also that, with respect to the rest of the country and the characteristics, the dualism that is described there, there is only the power to preserve and not to promote? How much of your concern resides in those separations of degrees of power, if you like, in that phrasing?

**Mr. Cook:** I think that is both related and a separate issue. My view is that the failure to provide parallel language is regrettable. While I understand the difficulties of provincial politicians in promoting the rights of their francophone citizens, thank goodness I live in a province where the record is very good, I nevertheless think it is regrettable that at the very least the federal government's powers are not defined in promoting what the Constitution now says is "fundamental."

That is a very strong word. Yet the federal government's authority is not specified. It has no role. It is simply that the Parliament of Canada has the role. It seems to me that "preserved and promoted" should be parallel phraseology, both with respect to "distinct society," if we are going to have that, and with the matters of "fundamental characteristics."

It seems to me also, to come back to this matter of judicial interpretation, the question that does

arise is, if "fundamental characteristic" and "distinct society" appear to be in conflict, which takes precedence? If in the promotion of its fundamental characteristics the government of Quebec, to take that example for the moment, decides that it has in some way to limit the rights of the English-language minority in Quebec, and the English-language minority says, "But this is a fundamental characteristic of Canada that we represent," which of those two words, each of which is rather vague, takes precedence? I suppose the court will have to decide.

My preference would be for the view that the fundamental characteristics of Canada took preference over the distinct societies that exist, which we used to call provinces, because every province of Canada is a distinct society in my view.

**Mr. Allen:** Could I ask you, since you have asked for more precision in the phrasing, whether it goes in an interpretive clause or whether it goes in the preamble, how would you go about setting out the characteristic that should be labelled as distinct? I think you are probably as in good a position as anybody that I know of outside Quebec to do that. How would you construct that phrasing?

**Mr. Cook:** As I said a moment ago, it is already perfectly clear that Quebec has a different civil law system. That is already recognized. It is already clear to everybody that the majority of Quebecers speak the French language, so that those things seem perfectly clear to me. But when one goes beyond that, I think I at least would need quite a lot of additional guidance. What we know about the history of Quebec in the course of the last 30 years is that as it has become a modern, urban, industrial society and one which is much more secular than it once was, its distinctiveness from the rest of us who live in North America is not self-evident. It was once said that Quebec was French-speaking, Catholic and rural. It is not French-speaking, Catholic and rural any longer. It is French-speaking, but it is urban and it is secular.

It seems to me the difficulty is precisely in that what it is that makes Quebec so distinct is less clear than it ever was in the past. That is why it seems to me important that those things be made specific. I, frankly, cannot go beyond what I have just said to you. Of course, there are some different institutions: there are caisses populaires and there are credit unions; there are the Expos and there are the Blue Jays; there are the national trade unions, the Quebec Federation of Labour, and the Ontario Federation of Labour. There are



certain other things that are conducted in a different manner in Quebec. There is no doubt about that.

It is also true of some other provinces, but does that require some explicit definition in the Constitution? What is it that is going to be in that distinct society that is going to be defended when some lawyer goes to court and says, "The Quebec government's request, demand"—what shall I say? Mr. Parizeau set out a whole list of them last week—"for autonomy in the field of manpower retraining policies...the Quebec labour force is different from the rest of the provinces. We are going to have to operate in that area"?

Or let us say that a Quebec government comes to power that goes back to the position the Daniel Johnson government had in 1968, which said: "The Canada Council and the Social Sciences and Humanities Research Council is engaged in activities that are essentially educational and provincial. We would like those agencies not to act in the province of Quebec but that instead Quebec be given direct financial compensation." Is that part of what a distinct society is?

As I say in my paper, if the Canada Council gives a grant to a Quebec scholar to study Quebec literature, is that preserving or promoting, or both, or neither? That is the sort of vagueness that worries me. When one simply talks about a host of institutions, it is an open invitation to take each one of those institutions and try to defend that as part of the definition.

**Mr. Allen:** I suppose one might observe that if Professor Hogg is right, that it is a relatively limited, in fact, an extremely limited vehicle for anything. It does not make a great deal of difference what Mr. Bourassa says it means for political purposes in Quebec when he brings home the bacon, so called, but when you fry it out in the pan, there is not much meat left. Why then are we worried?

**Mr. Cook:** But Mr. Bourassa comes home and says, "Dear me, I told you the 'distinct society' clause included an extension of our powers and the Supreme Court says it does not. We have been hoodwinked again, have we not?" That is what he says, and Mr. Parizeau says: "Right. Just as I told you so."

**Mr. Allen:** I do not want to monopolize the floor, but I have another line of questioning about spending powers and some more general questions there. Do you want to break and come back, Mr. Chairman?

**Mr. Chairman:** Mr. Eves.

**Mr. Eves:** Professor Cook, you have indicated you are concerned about the method of arriving at the constitutional amendment. You heard the question I asked of our previous witness, Professor Smiley. How would you respond to the same question: if amendments are needed and we or other legislatures or legislative bodies or committees of the same decide that something could be clarified by way of amendment, would it not make common sense to do it before the final draft is ratified?

**Mr. Cook:** It makes perfect common sense to me, Mr. Eves. I see no reason why it cannot be tried again. I see no reason for another observation you made when you originally asked the question. We now have one provincial Premier in this country who is, in fact, not committed to it, who is, I expect, going to make some requests. It may be necessary to talk to him. So I do not see why the process should end.

In 1956, 1965, 1971 and 1982, the government of Quebec rejected agreements that had been reached by the other provinces in matters of constitutional amendment. It was not the end of the world. They went back to work and tried to produce yet another agreement.

**Mr. Eves:** I would like to have your thoughts on a couple of other matters. First, you said at the outset, I believe, that you saw as a problem the method proposed in the Meech Lake accord for the admission of new provinces. Could we have your thoughts on that?

**Mr. Cook:** It seems to me that at the very least we need to have some better explanation on the admission of new provinces, which was once in this country simply a matter between the federal government and the new province, and then in 1982 it was placed in the category where it required agreement of a proportion of the other provinces before admission could take place, and it now has been moved to the category of unanimous consent.

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I do not understand why Prince Edward Island should have an enormously deep concern about whether the Yukon becomes a province of Canada or not. It is unfair to pick on the smallest province of Canada. I do not really see why the province of Ontario should have a veto power over that. It seems to me to put those people who have the misfortune to have moved to the Yukon in a position where they may have to wait for ever to achieve provincial status. Or, alternatively, when the proposition comes up, each one of these provinces is going to say to the federal govern-

ment, "We would like a little of this or a little of that before we will put our hands up in favour of this."

I think it is entirely unacceptable, frankly.

**Mr. Eves:** The last point I wanted to touch on was the point made by one of the witnesses yesterday, Professor Baines from Queen's University. She was concerned primarily with whether or not the accord puts "women's charter-based equality rights at risk" to quote her. She said failing the lack of a consensus among this committee or others to amend the Meech Lake accord, she was suggesting there was precedent for directing a reference in the form of the constitutional reference case of 1981. What would your opinion or thought on that be?

**Mr. Cook:** That is a question, sir, in which I think I would simply say that if she, who is a constitutional lawyer of some standing, believes that is possible, then I think she is correct.

I do however know, as you probably know, that some effort has been made to get a reference case on the issue that you asked me about earlier, about the provincial matter, and that has been unsuccessful. It is not absolutely clear to me whether such a reference case could be referred to the court, or whether the court would accept such a reference case.

**Mr. Morin:** What would you do about referring the definition of "distinct society"?

**Mr. Cook:** A reference case? I think it would really be putting the cat among the pigeons to ask a court to define that subject before it had a specific case before it. I really suspect the court would be unable to do it.

I also think, in keeping with what I said earlier, in my view that is not the court's job. This is a political decision and the political leaders of this country must come to an agreement about what they mean by such fundamental things as that.

**Mr. Chairman:** Professor Cook, I do not think there is anyone around this table, or perhaps in this room, who is happy about the process by which this accord was reached and I do not imagine, certainly speaking for myself, I would ever want to have to look at a constitutional document in this way again.

None the less, a situation evolved where these 11 people agreed to an accord and then brought it back for comment and discussion. One of the problems that I think we have is that there is, if you like, I suppose the difference between dealing with this where it was open-ended in terms of changes and so on and where there is a sense of being constrained, is that this fact

creates a certain reality, a reality in Quebec, where one of the factors, as we look at the comments from different groups and try to decide what our recommendations should be to the Legislature, is what will the impact be on the province of Quebec if we were in fact to reject this?

Obviously, we cannot know with any certainty, but in terms of your own historical work, your long connections with the province of Quebec and with various people there, what would your suggestion be to us as to how we should approach that matter? What impressions do you have in your own conversations with colleagues and others in Quebec as to what the feelings might be if we were to either reject the accord or to request the specific amendments?

**Mr. Cook:** Mr. Beer, this is a question that historians always get asked about the future, is it not? I think I would begin by saying, to repeat what I said initially, I am not really urging you to reject it, I am really urging you to say this is a wonderful first draft and let us go back and see if we can make some improvement on it. If no improvements can be made, then we get to the next step, which may, in fact, be, "Would you reject it or would you not reject it, Professor Cook?" I guess I would reject it, but that is not the stage we are at yet.

I do not think we can predict what would happen in Quebec. On December 5, 1987, Premier Bourassa said: "Si les Québécois tiraient la conclusion que la reconnaissance de la société distincte n'est pas acceptée par le reste du Canada, je ne sais pas comment ils vont réagir." "I do not know how they would react," he said, and so I cannot go beyond the Premier of the province and make a more firm prediction.

I think it would cause a serious problem. Some politicians would argue that, "You see, there they won't even accept the most modest sort of agreement." But over against that, I must set the fact that, as I cite at the beginning of my paper, Claude Morin, who says that if this distinct society business turns out to mean nothing, then Quebecers will be very angry and they will be fighting again.

Professor Leon Dion, who was adviser to the Royal Commission on Bilingualism and Biculturalism, to the Pepin-Robarts commission and for a while a special consultant to Mr. Rémiillard of the Quebec government, the new Minister responsible for Canadian Intergovernmental Affairs, in a new book which he published two or three weeks ago, said precisely the same thing. "If this does not mean anything, if this does not



give Quebec the kind of protection that we believe Quebec should have, I will personally join the independence movement," says he.

Two academics do not make a landslide, but there are both sides of this issue, I think. Obviously, it is dangerous. Obviously, it is difficult. But once again, as I said earlier, in the past the Quebec government has turned down constitutional propositions accepted by others, and we returned to the bargaining table and began to work again.

You flattered me at the beginning by saying I had been studying this matter for a long time, and it is true. One thing I have concluded over 30 years is that the people of Quebec do not react to things in a kind of lightning-bolt fashion. We have been fearing for those 30 years that one last mistake would end with Quebec separate, and I think this is not the case. This is a people who are very realistic, hardheaded, hard-nosed, and in general wonderful in my view, but they are not simply going to say: "That is a terrible slap in the face. If we cannot have that, we do not want anything." I think that is simply not so.

To repeat what I said at the beginning, my proposal is not to reject but to try to reopen and discuss some of these things further.

**Mr. Chairman:** Mr. Allen, if there are no further questions, this will be the last question.

**Mr. Allen:** I suppose, more than most of us, either in the academic or in much of the political community, you have been reasonably close to Mr. Trudeau over a number of years and have a sense of the way his mind works. I have been puzzled, and I think other members of the committee have been puzzled, by Mr. Trudeau's reactions to Meech Lake, not always surprised at all points but certainly in the overall cast of his response.

In light of the fact that many of the things Trudeau himself tried to accomplish; for example, in the white paper of 1978 and the bill that followed, which did not finally see the light of day; the operating style with respect to shared-cost programs and his own words describing that whole arrangement; that he was willing to look at significant Senate reform and did not seem to be unusually concerned about including the provinces in consultations around Supreme Court appointments and so on: it seems strange that the agreement should have received such a completely frontal attack by him. Much that he says in his response seems to deny much that he was earlier going for.

Can you explain for us Mr. Trudeau's reaction to Meech Lake? Is there something that is extremely, terribly and greatly different here from the cast of his own political behaviour over the years that he was in power?

**Mr. Cook:** Mr. Allen, I think that is an unfair question. I do not think anybody can speak for the former Prime Minister of Canada in these matters or in any other matters. I would not try to, other than to say this. "Distinct society" is a code word for special status. That is really what "distinct society" means, if we want to get right down to it. You may recall that with respect to Mr. Trudeau's career, before he entered politics and after he entered politics, the one thing he shared with Mr. Lévesque was always the conviction that special status was an unending debate about the meaning of a term that could mean absolutely anything, but what it implied in his mind was the idea that Canada was composed of two different nations.

What he stood for all of his life was the conviction that Canada was one nation with two languages and many cultures; and as to the idea of special status, Quebecers did not need special status, that it was undesirable to identify the nation with the province, because once you identified the nation with the province the nation would simply continue to demand and ask for more.

Whatever else Mr. Trudeau may have thought about the details of Meech Lake—the decentralizing effect and so on—there is no question in my mind that his central concern was that we were returning, as I believe we are too, to the debate we thought we had ended in the 1960s, that is to say the debate about the definition of this business of what used to be called special status, particular status, associate status, and we are now calling it "distinct society." We are going to find that we will have unending debate about what that means in the next 10 years. The debate we thought was finished has now been reopened. I believe that to be his view. If it is not his view, it is mine.

**Mr. Allen:** If that term and that concern about special status, distinct society, all the terms that you reeled off, continue to be a constant factor in the reality of our political life in Canada, why then is there such an intense problem in embedding that language in the Constitution?

**Mr. Cook:** Because I do not think it means anything. It does not mean anything clear. What it means to you, it means something different to somebody else. I think the people of Quebec are very straightforward people. If you say to them,

"Here is what you are; you are a distinct society," they will then say, "Well, being a distinct society implies that we should be able to send ambassadors to France." If you then say, "But I didn't mean that," they are going to ask you, "Then what did you mean?"

That is what I would say. If you say that Quebec is an elephant and they say, "Well, now give us the hay to feed it;" and if you then say, "There isn't any hay," they are going to ask, "What kind of an elephant was that you gave us?"

I am being silly now, but I do not mean to sound silly. Let us talk about what it is that we are talking about, instead of using these wonderful big phrases. This is not a lecture hall in political science or history that we are talking about. It is writing a constitution that the Canadian people have to live by.

Therefore, I think it should be a lot more precise, and understood by the people who are being asked to accept it. I really do think we are reopening this debate that preoccupied us so much in the 1960s and the 1970s. Perhaps that is the only route we have to go, but it makes me despair a little bit that we do.

**Mr. Chairman:** I am going to give the last question to Miss Roberts, who had to leave when she was on the list.

**Miss Roberts:** I will be as brief as I possibly can. From a historical point of view, what is the importance of Quebec's being left out in 1982? Is there any importance with respect to that?

**Mr. Cook:** From the point of view of the history of this country, it is simply enormously important. The community of this country that is French-speaking, part of which is in Quebec and part of which is not in Quebec, is absolutely fundamental to the country. I think it is terrifically important. From a constitutional point of view, of course, it is of limited importance since Quebec was never out of the Constitution. I lived there all last summer and I did not have to have a passport to go to Ottawa in the summertime.

I think that it is very important to arrive at an agreement, not an agreement at any price or not an agreement at a price that we do not know. It seems to me that Quebec being out of the Constitution is not something we can accept as agreeable for even five minutes; but on the other hand we should work at developing a constitution that is satisfactory to Quebec and which will also be workable for the rest of us.

To that let me add that if there is any sense in English-speaking Canada that once this Constitution is accepted Quebec will be satisfied with

everything it has got, let me assure you this is not true. Premier Bourassa has already announced that the next constitutional amendment he wants is one that will allow him to restructure his school system on a linguistic rather than a religious basis. So there are more items on their agenda as well.

My answer to you is: absolutely of fundamental importance to me. My conviction about this country is that it is a country in which there is in some ways one very fundamental community which is French-speaking and another which uses English as its language but is composed of a great variety of other peoples. There cannot be a Canada, as I understand it, without those two peoples.

So there must be an agreement about the Constitution. I would like it to be one in which we are clear in its meaning so that we do not continue to have this debate about what it means to be in the Constitution. That is not a very good answer.

**Miss Roberts:** Is it fair to say that even if we are clear, as we have been or have attempted to be in the past, there is always going to be a challenge to the courts with respect to it, or there may very well be?

Is it the thrust of your paper that "distinct society" should not be used as a general term but that we should try to more clearly define what Quebec may wish; such as set out in section 91 or 92, something like that? You are saying, "Do not use that term at all, but try to redefine something that deals with Quebec in certain areas that they think are appropriate." Is that not correct?

**Mr. Cook:** Yes. If you push me to that point, I would say that I would prefer the term "distinct society" were not used. I do not think it means very much, frankly. I would rather the concrete powers that the province feels it needs in this Canadian federal system of ours were clearly defined and understood. That would be my view. If, on the other hand, it does satisfy some people in a symbolic sense to be able to say that they belong to a distinct society, that could be put in the preamble. I certainly would not object to that.

As I say, "distinct society" is not a very satisfactory term. Who would deny that Prince Edward Island is a distinct society? It is not a very meaningful term; it does not seem so to me.

**Miss Roberts:** You appear not to have too much faith here or wish not to put too much faith in the Supreme Court in dealing with various clauses. You feel it is more important that the legislatures of the provinces and/or the federal government set it out as clearly as they possibly



can. But is it not a fact that no matter how clearly they set it out, that is always the last resort, the problem being what type of evidence and what type of thought process the judges of the Supreme Court go through for the purposes of arriving at their particular decision?

**Mr. Cook:** Let me apologize if I led anyone to believe that I did not have any respect for the Supreme Court, because I have an immense respect for the Supreme Court and all of its members. But I have such respect for them that I think we should be careful about how much we increase the burden of the work that they already have to do. It seems to me the greater the generality, the more the court is going to be called upon to make decisions about very fundamental questions. Again, I repeat, I think this is a political question, not a judicial question, but there is no doubt in my mind that the court is still going to hear cases about these matters.

We are in the future, let me remind you, going to have a court which not only has greater responsibilities but we are going to have a different court. We are going to have a country in which the Supreme Court justices of the provinces are appointed by the federal government and the federal Supreme Court justices are nominated by the provinces, which is a kind of Alice in Wonderland world, but there it is. We are going to have a new set of judges who will be nominated by the provinces. It seems to me that given that fact, given the overall decentralizing

implication of Meech Lake, it is all the more important that we have a fairly clear and specific understanding of what that agreement means. But my respect for the Supreme Court is, I may say, even greater than it was before the Morgentaler decision.

**Mr. Chairman:** On that positive note, we want to thank you very much for coming and putting forward some challenging views with respect to the accord, ones which we are going to which the Supreme Court justices of the provinces are appointed by the federal government and the federal Supreme Court justices are nominated by the provinces, which is a kind of Alice in Wonderland world, but there it is. We are going to have a new set of judges who will be nominated by the provinces. It seems to me that given that fact, given the overall decentralizing implication of Meech Lake, it is all the more important that we have a fairly clear and specific understanding of what that agreement means. But my respect for the Supreme Court is, I may say, even greater than it was before the Morgentaler decision.

**Mr. Chairman:** On that positive note, we want to thank you very much for coming and putting forward some challenging views with respect to the accord, ones which we are going to have to consider most closely. Thank you again for being with us this morning.

The committee recessed at 12:21 p.m.

## AFTERNOON SITTING

The committee resumed at 2:07 p.m. in room 151.

**Mr. Chairman:** Gentlemen, we will begin the afternoon session. We are delighted to have as our first witness Professor Peter Russell of the faculty of law, University of Toronto. I might note for those who are not aware of it that Professor Russell is probably our main expert on the Supreme Court of Canada; he certainly is one of the main experts on the Supreme Court of Canada. He has brought a paper with him which we are copying, although he is going to speak from notes. Without further ado, I will turn the microphone over to you, Professor Russell, and let you begin.

PETER RUSSELL

**Mr. Russell:** Thank you, Mr. Chairman. With respect, may I correct one thing. I think I heard in the introduction that I was from the faculty of law. Since it is probably a great violation of the regulations of the Law Society of Upper Canada, if not the Criminal Code, to parade oneself as a lawyer, I want to hasten to correct the record. I am a member of the department of political science and I am a political scientist, not a lawyer.

**Mr. Chairman:** We have been overwhelmed by lawyers this week. We are delighted to have you here as a political scientist.

**Mr. Russell:** I am going to cover three items in my opening remarks and then answer any questions members may have for me. First, I will say a little bit about my overall appraisal of the Meech Lake accord; second, a little bit about the Supreme Court of Canada proposals because, as you indicated, that is an area where I have some special interests; and finally, I would like to say a few things about the future constitutional meetings and what I hope might be a position Ontario would take in future constitutional conferences.

To begin with the overall appraisal of the accommodation, the Meech Lake accord, I am here to urge you to recommend to your Legislative Assembly that you support the accord. I say that because I regard it as a reasonable accommodation with Quebec. I should explain in just a few words why I think it is so terribly important at this stage in our history to come to terms with Quebec and, more precisely, to make amendments to the Constitution that will make it possible for Quebec to accept the amendments that were

made to our Constitution in 1982, amendments that were made without its support.

I regard it as of great importance to obtain Quebec's support for our overall Constitution, including the amendments made in 1982. I do so because I think that accommodating Quebec is essential to move us closer to a constitutional democracy in which the Constitution is based on the consent of the people.

For Quebec, this is particularly important. In 1980, for the first time since being militarily conquered by the British, the people of Quebec, particularly the Québécois, the French Canadian people of Quebec, were directly consulted on the kind of regime in which they wanted to live. We all remember that. It was the kind of debate a society cannot go through very often.

They went through it and participated in it and they decided—by a rather slight majority when one thinks of just the Québécois, the French Canadian population—in favour of Canada as their future, but “on condition.” What was that condition? The condition was that they were promised a changed Constitution, “a revitalized federation,” in Mr Trudeau's phrase. Mr. Chrétien and Claude Ryan used other phrases. Vague, yes, but still pointing in one direction: some changes in the structure of our Constitution that would give some special place for Quebec.

The promise was not fulfilled in 1982 to those people, that majority of Québécois who voted for Canada. We welshed on the promise. It is time we came clean. That is why it is important to accommodate Quebec. It is not a legal requirement—we know that—but I think it is a moral and a political requirement if we are to have a country with a Constitution based on the consent of the governed.

It seems to me the only alternative to this accommodation is to argue (a) that you do not need to accommodate Quebec, that it does not matter. Some people may believe that. Some people may not believe in the principle I put to you of government by consent or may not believe it is particularly important to gain the support of the Québécois. I disagree with those people about their vision of our constitutional ethic. Or it is perhaps possible (b) to say, “Yes, accommodate Quebec, but we can do it on better terms, maybe later on.” I think that is highly doubtful. I think it is very doubtful that an elected government in Quebec can present the rest of Canada with, shall we say, milder, less demanding terms



than Mr. Bourassa's terms, which form the foundation of Meech Lake. That is where I profoundly disagree with my distinguished historian friend, Ramsay Cook, from whom you heard this morning.

I will concede that while we have to make some changes in our Constitution to accommodate Quebec, I would not accommodate Quebec at any price. In other words, maybe their terms are low, but still, have they exacted too great a price from the rest of us? To accommodate Quebec it would be foolish to fatally weaken the capacity of our national government to deliver the level of services in the area of the economy and justice that Canadians want. It would be foolish, in effect, to erode our Charter of Rights and make it a weak and inept instrument for protecting the rights and freedoms of Canadians.

If I thought for a moment that we had done that or were doing that in accepting the Meech Lake accord, I would be opposed to the Meech Lake accord. But I am not convinced for a moment, nor indeed, I would say, are most of my colleagues in my discipline. You have heard from some and you will hear from more that we are, in terms of Meech Lake, fatally weakening the central government in Canada or fatally putting holes and weaknesses in the Charter of Rights, or even saddling our country with an excessively inflexible amending formula. I do not think we are doing any of that. Again, if we were, I would be opposed to Meech Lake. So overall, that is why I favour the accord and hope your Legislative Assembly will too.

Let me move on to say a bit about the one part of the accord where I have done a fair bit of work in the past as a scholar, and that is the Supreme Court proposals. I think your clerk is distributing copies of a paper that I wrote for publication in an academic journal called Canadian Public Policy. It will appear later this year. It is a rather long paper and I am not going to go through it all by any means, but I want to say a bit about the argument in it.

Basically, the argument in that paper on the Supreme Court proposals is that they represent a distinct improvement on the existing method of selecting and appointing Supreme Court judges.

Why is that so? Well, I believe it is so because as a principle of constitutional government I think it is essential to have some real checks and balances in how the judges on the highest court of the land are selected and appointed. I think in principle it is wrong to have the power to choose those judges concentrated in too few hands. The judges on our highest court are, among other

things, the adjudicators of our federal system, of our federal disputes between our two levels of government, as you well know. They also, since 1982, have assumed an enormous role in adjudicating disputes about the division between the power of government and the rights of citizens.

To put the process that selects those judges, with that enormous power, all in the hands of a few politicians in one level of government is, in principle, wrong. I say that without any animus or criticism of how the politicians in recent days, under both the Trudeau and Mulroney governments, have selected judges.

I think the Constitution has to be written for the long haul, and in the long haul I think we are in jeopardy if we do not build some checks and balances into the method of appointing the highest judges, who have such a role in interpreting and applying our Constitution. No other western constitutional country where the constitution is important and the judges' role in interpreting it is important has risked leaving such a monopoly of power in the hands of literally two or three politicians—really only two: the Minister of Justice and the Prime Minister.

Given that principle, the question is how you get checks and balances. We know how the Americans do it: They do it through their Senate. That is a formidable check and balance on the power of the American President to appoint judges. We have just witnessed what a check and balance it is through the Bork, Ginsberg and now Kennedy hearings. I add in parentheses that, I think this morning, if I read the Globe and Mail right, Mr. Kennedy's nomination was finally ratified.

I do not think we can have that check and balance in our system, because at this point in our history we do not have that kind of Senate. I need not expound on that to members of this committee.

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So where do you find a credible, significant check and balance in our system? There is no doubt in my mind that between elections in Canada—and it is between elections when judges are appointed—the strongest force countervailing the federal government, the strongest countervailing political force in Canada checking the federal government, is the provincial governments, their prime ministers particularly. They are the strongest prevailing countervailing political force in Canada. We may not like it; some Canadians would rather have it in the Senate, but that is another country. This is our country, and

in our country that is the way it has developed. Given that, I think it makes sense—and I have thought this for a long time, as have many other Canadians—that the provinces have a role in selecting the judges who sit on the Supreme Court of Canada.

The one criticism I would make of the way this role is provided for in the Meech Lake proposals is that I think the respective roles of the federal government and the provincial governments have been put, if I may use a crude phrase, ass backwards. When you think of it for a moment, we have the provinces under the Meech Lake proposal playing the nominating role that the American President performs, and we have the federal government playing the role which in the United States is played by the Senate.

I think it would make a lot more sense were it reversed. I do not think it is so bad as it is that we have to go back and try to renegotiate the accord, but I do think it points one towards how this defect might be remedied. The remedy should point us towards getting a more responsible and balanced process of nomination, instead of just depending on the sort of ad hoc, maybe rather political, nominations that will flow from provincial governments.

The kind of remedy that I think should be put in place is one that needs no amendment to the Meech Lake accord. It can be done quite informally. It has been put forward by two important bodies in Canada. One is the Canadian Bar Association. I hope that will not taint it too much with the nonlawyers on this committee. I can see one of you saying: "Gosh, that is the kiss of death. It came from those people." The other is the Canadian Association of Law Teachers.

To their credit, if you read their reports, you will see that they transcended what has perhaps been a narrow focus of the law profession in the past on the selection of judges. They have called for, in each province, the establishment of nominating bodies which in no sense are dominated by lawyers, nominating committees that would have four kinds of members: (1) really political members representing both levels of government; (2) some judges; (3) yes, some lawyers; and (4) some ordinary folks who are not lawyers, judges or politicians, some lay people.

They have various formulae. I think the numbers one can debate and argue about. My own notion would be for each province to do this according to its lights and in negotiation with the federal government. I think there is room for a lot of experimentation here. Nothing should be cast in stone. We should experiment on how to set up

useful nominating bodies that have a chance of producing a judiciary not only for the Supreme Court but, just as important, for the other courts to which the federal government unilaterally appoints judges in every province—a judiciary that will represent the diversities of this country, its political diversities and social diversities.

I think that is something the Ontario government should be urged to work on—I think it may already be interested in moving in that direction—and, I repeat, need not and should not be put in the Constitution. We do not know enough about this kind of process to entrench it in the Constitution. Maybe 100 years from now we might have worked out something that we are all happy with.

Let me leave the Supreme Court, although I would be happy to come back to it. There is a lot more I would like to say on that, but I would like to move on to my third point, which may be for this committee the most relevant point in terms of your committee having a real influence on the future. I say that because, if I were Jimmy the Greek, I would think Meech Lake is likely to go through the assembly, given my sense as a political scientist as to how governments work. You know what I mean.

What may be much more open to change and development through the influence of your committee than any change in Meech Lake is what happens when the next first ministers' meeting occurs on the Constitution. To my horror, but my humorous streak was aroused also, section 13 of the so-called Meech Lake accord welcomes us to a first ministers' meeting on the Constitution at least once a year commencing in 1988 and, as I read it, not only the year after that and five years after that and 10 years after that, but 100, 200 or 300 years after that, which literally blows my mind.

What other country in the world would build into its Constitution a commitment to discuss and debate the Constitution at a first ministers' level every year for ever and ever? I would hope one of the first amendments is to put some time cap on that particular clause. However, there will be and I think there need to be, some meetings in the immediate future because there is some unfinished business before Canada on the Constitution. We certainly know that in the aboriginal rights area. Our citizens and governments in our northern territories have constitutional interests that have not been addressed and they need to be addressed.

We also know that in the western part of the country particularly, not exclusively but particu-



larly in the western part, there is a big interest in a major restructuring of our federal Parliament, an interest that focuses on the Senate and the idea of replacing our upper chamber in Ottawa with a new kind of body, a new kind of Senate designed really on Australian lines; what is popularly called a triple-E Senate: equal representation from the provinces, elected, and effective; meaning with full legislative power.

That will be on the agenda—I should think, if I have been reading the papers correctly—probably, most likely, the next the time the first ministers meet, which if section 13 of the accord becomes law, would have to be in 1988. I am here to put in front of you an alternative idea to an elected Senate that I hope at least Ontario and maybe other provinces might consider. The alternative to an elected Senate, in my mind, is to introduce a measure of proportional representation into the House of Commons. I suppose the other side of that notion is then to abandon the Senate.

The reason I think you should, I hope, think about that alternative, is I think it would be a more effective way of dealing with the structural inadequacy of our national Parliament, the inadequacy that the triple-E Senate is aimed at, without creating some of the problems that a triple-E Senate will give us. The inadequacy that most spokespeople of the triple-E Senate are concerned about in our federal Parliament is its apparent limitations in adequately representing the diversities of Canada, the regions of Canada.

We went through a period, particularly in the 1970s, when each of our national parties was very strong in one region of the country and not so strong in the other: the Conservatives strong in the west but weak in Quebec, and of course the Liberals the reverse of that.

**1430**

With our electoral system of “first past the post,” it created governments in Ottawa and government caucuses that seemed to severely underrepresent: if it was a Conservative caucus, to underrepresent Quebec; if it was a Liberal caucus, to severely underrepresent the west. In the case of the west, that led to so-called western alienation.

The idea is to have a Senate in which that could not happen, so that if the government in power responsible for the House of Commons had particular regional bias, it would be compensated by the representation of all the regions equally and all the provinces in the Senate.

Now, my argument would be that the trouble with having an elected Senate is it would make

the conduct of parliamentary government in Ottawa extremely difficult. I did not realize how difficult until I spent six months last year in Australia, rather carefully watching the Australian Senate, before and through and after an election.

What I can tell you is that the problem there with the operation of that Senate is that it gives the balance of power in national government to a very small number of senators in the Australian Senate. You may ask, why is that? I will tell you why, and I did not understand why until I went and looked at it. When they have a Senate election there, they have proportional representation as their method of election for the obvious reason that if they have the same method of election that they had for the House of Representatives, it would produce much the same result and you would not get the different complexion.

Under proportional representation, the two major parties split the vote very closely, as happens in our elections. Each gets about 47 to 48 per cent of the vote. You add that up and it is about 95 per cent. So they each have 47 or 48 per cent of the Senate. Guess who has the remaining five per cent? The oddballs. Interesting oddballs. Small parties. Maybe we have some here and maybe you guys like that. I will tell you what it does for the government of the day. The government of the day has to take all of its legislative program to four or five senators, who received about five or six per cent of the vote, and see if they approve of it bill by bill. You may like that; I think that is an abomination for parliamentary governments.

My one final point about not having the Senate is that I happen to believe we have enough checks and balances on our federal government as it is. I think checks and balances are good. I do not trust anyone very much in politics and I want some checks and balances.

In the United States, there are two major checks on the President: Congress and the Supreme Court. It is the same in Australia. The Senate is a real check on the government of the Commonwealth of Australia, as is the High Court of Australia. It is a tiger.

In this country, we have two checks. We have a Supreme Court; it is becoming a tiger. We have 10 Premiers; they are tigers. They are not going to become pussycats with an elected Senate and I think two checks and balances are enough. If we do some restructuring of Parliament, and I think there will be pressure at the first ministers' conference to do so, I would prefer that thought be given to changing the electoral system, at least

for part of the House of Commons. If you have studied the proposals for proportional representation, I think you will see how they could remedy to some extent the regional skewing of representation that occurs under our simple first-past-the-post system.

I will conclude my opening remarks there.

**Mr. Chairman:** Thank you very much, Professor Russell. I am not sure whether each of us at some point is perhaps an oddball, but we will certainly take those descriptive remarks to heart as we consider our recommendations.

**Mr. Breagh:** I feel as if I am halfway to the Senate already.

I want to pursue a couple of what I consider to be typical Canadian aspects to this. It strikes me, first of all, that the accord itself is very much a Canadian kind of document. It is based on the premise that we will all be reasonable and nobody will get outrageous and the thing will kind of work out. If you do not accept that premise, then you really do get caught on the precise words that are used in the agreement and the things that are not said in there.

For example, in appointments to the Supreme Court, the document itself does not do very much in the way of fine print, but it establishes the principle that essentially these will be nominated by the provinces and subsequently will be put in there in some way by the federal government. I note that in your paper you went to some lengths to describe how we might go through a process that would not exactly vet the candidates, but would provide background or a means of bringing forward nominations.

But all of that is really not much different from the current situation. For example, it has been rumoured, although it is hard to nail this down, that the way people get appointed to things like the Senate or the Supreme Court of Canada is that someone in the federal government calls a friend in the Premier's office and says, "Who do you know who would be an appropriate person to nominate to the Senate of Canada or to the Supreme Court?" With some reservations about whether they are qualified, particularly in the Supreme Court decisions, friends of a government tend to find their way into those posts.

I do not see the accord being very much different from the status quo. It is formalized. There is a process. It will lend itself to a kind of embellished process, as you have done in your paper, but I do not see a startling difference. I would like to get your comments on that.

**Mr. Russell:** Sure. I think my comments really are addressed to a kind of appointment,

Mr. Breagh, which we have seen very little of so far in our history. They are what I call ideological appointments. We have certainly seen lots of them in the United States. It is the difference between appointing a judge because he is simply known to you and has been a friend of your party—that is what I call appointing cronies—and appointing an ideological soulmate.

What we have been seeing in the United States for a great many years, by no means just with President Reagan but going away back in American history, is a consistent effort by presidents to put not so much their cronies—Bork was no crony of Ronald Reagan—but to put their ideological soulmates on the court so that they would steer the constitution in the direction the President wanted it steered.

We have had rather little of that, Mr. Breagh, in our history. Our historians have delved into the archival material and have found on occasion some of that. In the book by Frederick Vaughan and James G. Snell on The Supreme Court of Canada, there are some interesting and somewhat amusing accounts of John A. Macdonald asking his justice minister, "Is he sound on Dominion powers?" That is the kind of thing.

As we move into what I call charter land, and we took a big stride into charter land last week with the Morgentaler case, people, both politicians and ordinary people, become more and more interested in ideologically shaping the court. Those who feel they lost in the Morgentaler case will be arming themselves to try to reverse that, in part by influencing the appointment of Supreme Court judges. Those who feel they did well will be equally concerned to ensure that the right-minded type of judges who made up the majority in Morgentaler will be replaced by judges of similar ideas.

If you do not build in some checks and balances, the danger is that you could enable a Prime Minister who felt deeply, as President Reagan felt, about what the court was doing wrong, to try to remedy and influence the course of constitutional interpretation by packing it over time. If you look at the chart at the back of my paper, you will see how the appointment of Supreme Court judges comes in clusters. It is very odd. It is not as if you appoint a Supreme Court judge every two or three years, so every Prime Minister gets his crack at it. It does not happen that way. It has not happened that way in the United States. Some presidents, like some prime ministers, will get a real go at it; others will not.



If you look at that chart and simply assume that there are no early retirements—the nine judges who are there now serve until age 75—you will see there is no vacancy until 1991. Then all of a sudden there are three. So if you were a Prime Minister and a justice minister in power from 1991 to 1994, you could put on three judges. Then if you were unfortunate enough to be the Prime Minister of Canada from 1994 to 1999, you would have a dry run, like Jimmy Carter. Then if you were lucky enough to be the Prime Minister of Canada from 1999 to 2003, you could virtually restructure the court by appointing a majority of judges.

I think we should put in some safeguards against that. There are none now. That is not because I suspect Brian Mulroney or accuse Pierre Trudeau of having an ideological approach to appointing judges. Quite the contrary; I cannot see that in their appointments at all. But I am afraid of the future. Meech Lake does give the federal government the final appointing power, but it can only appoint judges who have been named by one or more provinces. In the case of Quebec, it has to be Quebec province. If it is not a Quebec vacancy, it has to be one of the other provinces.

**Mr. Breaugh:** Just two quick points to conclude: I made the assumption, and I think most people would in reading the accord, that some process such as the one you outlined in your paper is required and therefore people will do it. Would you advocate, for example, that this committee take under consideration some recommendations about the process, without getting too finite about it or without laying down one example of how to do it; just simply speak to the matter that we all made the assumption that there will be some recognized public process to it, some establishing of credentials?

I think I agree. I do not share the concern that, for example, the current Premier of British Columbia, who is of a different political stripe from any of the other premiers, would take it upon himself to appoint someone who was very right wing to the Supreme Court of Canada. I do not think he could really do that. He could cause some problems for a while but he could not accomplish that.

That is one thing I would like to pursue with you. The second thing is, as the Supreme Court takes on more and more of a significant role in establishing what is legal in Canada—I think the events of recent weeks have shown that it has certainly begun to do that—one other thing

becomes apparent, that our system of government is not really plugged into that yet.

When the Supreme Court makes a decision and says, "Tomorrow morning at nine o'clock, all your therapeutic abortion committees are no longer legally required," the rest of the country goes spastic for a while. Attorneys general say, "We do not know what that means." Hospital administrators say, "We are not sure how to handle that. The Ontario health insurance plan does not know how to do that."

In other words, our political system is basically one which is different from the United States. Normally, if a major change like that were going to happen, the politicians would say, "The ministries will go and negotiate for six months and we will implement that next August 15 and we will have a start date." When the Supreme Court is the agency which makes the decision and says, "As of now, the law is changed," it sometimes traumatizes our political system.

Is there anything that you can think of that we could do that would assist us, because I think, whether you agree with the Supreme Court's decision or not, you cannot agree with creating chaos, which is tantamount to what we are doing here? What kind of a process could be used that would, if not eliminate that, at least get it into manageable proportions?

**Mr. Russell:** On the Supreme Court side it is possible for it to adopt in some decisions a policy of what is called prospective overruling. We saw a rather interesting example of it in the Manitoba language rights case, although it was not done very smoothly. It was done in two steps. They first ruled that all of the laws of Manitoba since the province's beginning had to be in both languages. Then, a few years later, realizing the havoc that might occur if laws that had not yet been translated into French were not laws—it takes years to translate all those laws—the court gave Manitoba five years to comply with the constitutional standard the court had laid down.

That is an extreme case, I grant you, but it is possible, if attorneys general see that type of problem looming ahead, if a constitutional ruling suddenly overturns some important part of the legal system, in their pleadings before the court, they may say, "If we are so unfortunate as to lose this case—we think that is very unlikely, of course," they would say—"if that unlikely thing happens and you rule against us, could we at least ask you to attach some sort of condition to give us time to get our house in order?"

I think that could be done. It would be better for it to be asked for than for the court to have to dream that up on its own, and to be one of the things that is argued about and discussed in the case. That is something for attorneys general to think of in preparing their arguments. Perhaps it is not something they want to push too hard, because they hope the laws they are defending before the Supreme Court of Canada will stand up, but sometimes they will not.

**Mr. Breaugh:** How about the process part, the process of selecting the nominees to the Supreme Court?

**Mr. Russell:** I think that is where we really have to do some experimentation. I certainly think that is the way to go in general for the committees I have talked about. I am not talking about the particular numbers of people who are on them, but structured along those lines, with people from those different constituencies in society.

I stress that those are needed in the provincial scene—less for the Supreme Court, though they would certainly help there, but more to give the province, its lawyers, some of its judges and citizens a role in selecting the highest judges of each province: the judges of the provincial Court of Appeal, the High Court of Ontario, for instance, and the district court.

As it is now, the judges are all appointed federally with some informal consultation with provincial attorneys general and sometimes some judges, but it is a very hit-and-miss affair. Having these committees in place would mean that the ideas that are fed in, the names that are fed in and the considerations that come into play in selecting these judges for all these courts would be much broader and would come from many more areas of society than they come from now, with a better chance, I think, of getting the kind of judiciary we want.

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What I am not sure about at all is how to make it more open. I am pretty dubious in our culture of doing what the Americans do in theirs and putting candidates for judicial office in the hot seat, in a room much bigger than this, with national television, being grilled about everything from whether they ever smoked pot to what they think about abortion.

In the American culture, that has become as American as apple pie. It has been going on for well over 100 years and eminent American jurists and lawyers accept it as part of the American scene. I do not think that is the case in this country. I think some of our most talented

lawyers and judges would be very averse to putting themselves through that public kind of grilling. I think we would lose a lot of darned good candidates. We would really reduce the size of the recruitment pool if we were suddenly to go American in that way.

I would prefer that we experiment with these larger committees. People know they would be there; names can be sent in that represent society in a broader way than the federal Minister of Justice can possibly, it seems to me, represent Ontario society; and let us have them interview and develop a short list of outstanding prospects.

**Mr. Chairman:** Professor Russell, questions that I think certainly have come up and are going to continue to come up are questions of interpretation. Clearly, as with the charter, so with the accord, were it to go through. We are then asking the Supreme Court to have to define a variety of things.

We spent some time on that this morning, particularly with Professor Cook, in talking about the distinct society and what did it mean, if it meant anything. If it meant something, should that not be set out?

From your perspective in looking at the Supreme Court and how it has operated, what is your sense about a term like "distinct society"? Is that something which one really does not want to put into a Constitution or is it inevitable that we have terminology that is necessarily vague? As legislators, as we look at this, we realize that for a lot of these terms, presumably, there are people who can argue on either side of that. What is your advice in looking at that kind of a problem and issue?

**Mr. Russell:** With respect to the term "distinct society," like the terms "peace, order and good government," "property and civil rights," "the right to liberty and security of the person" and "freedom of expression," they are all very general and vague phrases. Sometimes they are in constitutions precisely because the politicians who negotiated the constitutional accommodation could not be more precise, because their accommodation did not go that far.

To take "distinct society," I suppose, one of the indistinct features of it is its impact on the charter. It could have said it has none or it has a lot. We do not know for sure. The politicians could not settle that. Frankly, if they had settled it in the way I think and predict the courts will eventually settle it, it will mean it has rather little impact on the Charter of Rights. But if it had actually said that in the text, that "nothing in this 'distinct society' clause shall influence the



interpretation of the Charter of Rights," I do not think Mr. Bourassa can go back to Quebec City and celebrate the accord.

If it said the reverse and it overrides the charter, I would not think many of the other premiers would want to bring it, as they are doing, to their legislative assemblies. Something the same can be said of why we have phrases like "peace, order and good government" and "property and civil rights" as the key terms in defining the division of powers between our two levels of government in 1987.

George-Étienne Cartier and John A. Macdonald had a political agreement. It went so far, but if they had started to cross the t's and dot the i's on exactly what Ottawa could do and what Quebec City could do, their accommodation would have probably broken apart. So we sometimes leave things to history, and with constitutions that means the courts have a lot to do with what these general terms come to mean.

One thing I can tell you about courts, and it is the only thing you can be sure of and you can be as sure of it as you can be sure the sun will set tonight and rise tomorrow, is that the courts will change their minds. They will not stand still. They did not stand still with peace, order and good government, property and civil rights. The last word on the right to liberty and security of the person was not written last week in the opinion on Morgentaler. The American Supreme Court should show us that. They have been all over the place throughout their history.

You can go further. Look at the West German court, the Indian court or the Irish court, all involved in interpreting vague phrases in constitutions. Judicial culture, like political culture, does not stand still. That is what makes it an interesting subject to study.

**Mr. Allen:** Thank you. It is very interesting that you should say history will decide, and the historian who was with us this morning did not want that to happen, apparently. In your opinion, just briefly on that before I get on to something else, Professor Russell, is there really any great difference in lodging the "distinct society" language in the preamble as distinct from lodging it where it presently is proposed to be in the text?

**Mr. Russell:** I think so. I think it is stronger as an interpretation clause than it would have been as a preamble. This is something to address to those constitutional lawyers who have read constitutional decisions on each. We have had very few constitutional decisions in our own country on what are called interpretation clauses. We have the multicultural interpretation clause in

the charter now. It is occasionally referred to not as a decisive point but really to strengthen what the court was already doing in interpreting the charter. So we have a very slight track record in our own country's jurisprudence on what an interpretation clause means.

We have more on a preamble. In quite a few cases, the preamble to the British North America Act was used; some judges saw in it some foundation for fundamental rights and freedoms from the British parliamentary tradition, because our preamble says we have a Constitution similar in principle to that of the United Kingdom.

On the whole, the preamble did not turn out to be a very strong basis for very much in our constitutional law. So I think an interpretation clause is a shade stronger. It is certainly something that can be introduced more systematically by lawyers where they can see it strengthening an argument as to how a particular clause might be interpreted. I do not think it can override the reasonably clear language of either the charter or any other part of our Constitution. I am very confident of that. That is not the role of an interpretation clause.

**Mr. Allen:** I gather that overall your position is that Meech Lake does not really represent a very radical shift in the evolution of Canadian federalism, that pretty much everything that is there has in one way or another been anticipated either in practice or what have you and that it does not, therefore, change major balances of power or interest or play of forces, provincial, regional or otherwise. Is that fair?

**Mr. Russell:** With one qualification: There is a time-bomb in it. It really is a time-bomb, and that is the interim arrangements for the selection of senators. You could see, over time—I doubt that it is going to happen; it would take a long time because senators are not dropping like flies, so there are not a lot of vacancies—

**Mr. Breagh:** Either that or it is hard to tell.

**Mr. Russell:** Right. Remember, it is just the interim arrangement where the nominations come from provincial premiers and the Prime Minister says he will abstain from selecting his own senators and he will appoint people to the Senate who are named by the provinces until—that is why it is interim—there is some major constitutional reform or abolition of the Senate.

#### 1500

Over time, if the premiers really pushed that opportunity, they could load the Senate up with some pretty interesting folks. The Senate that Mr. Trudeau loaded up is already creating a little

bit of a problem in Ottawa. The kind of Senate the provincial premiers might build over 20 years could be dynamite, I should have thought, and that could change things. I think that is why it is a time-bomb ticking away and ought to put some sense of urgency into getting some other approach to Senate reform.

**Mr. Allen:** I suppose as long as the present framework of the Senate's exercise of power remains as it is, one could tolerate that kind of activity from the Senate as long as it was not triple-E and equivalent to the House of Commons in its overall power and capacities, because you can see an end to the road in the game-playing presently, if you want to put it that way.

**Mr. Russell:** Yes, that is true.

**Mr. Allen:** An item in that respect that you mentioned in passing was making the House of Commons proportionally representative. However, in some people's eyes, that would leave us open to some of the problems you suggested exist in another way in Australia, namely the problem of the emergence of small groups that might hold inordinate degrees of power. Whether that is good or bad, none the less, I was a little bit surprised that you seemed to be accepting it in one place and not in another. Can you explain that for me?

**Mr. Russell:** Yes, indeed. With proportional representation, you are quite right, you would have a more fragmented parliament and more likely than not a minority parliament, which has been the result in many of our recent elections anyway, but we would have it even more often; no party with an overall majority. This is with proportional representation.

What you would have is, I think, the experience that European parliaments have: You would have the forging of a coalition government that builds right into the cabinet and to the making of government policy the points of view of at least two parties. That I think is more desirable than the Australian situation, where you have one party controlling the House of Representatives and the cabinet and making government policy. It is held up to ransom, bill by bill, in a most incoherent way, by a very, very small group in the other House. It makes it very difficult to have any kind of consistency and coherence in government programs.

I am all for a more, if you like, sort of pluralistic government that better represents the different interests in the country, be they regional interests or even to some extent ideological interests, but I would rather build that in a

coherent way to a single government. Do you see the difference?

**Mr. Allen:** Yes.

**Mr. Russell:** I think Canadians should take a good hard look at this idea of an elected Senate with a different political complexion than the House and what that will mean to the governance of Canada, each with a mandate, a solid mandate to do its will, but with different wills as to what should be done. That is a parliament truly speaking with forked tongue, each prong of the fork feeling it is entitled to get its way. I do not think that is a good system. I think it is OK in the United States. You have a President and you have a Congress. That is a check and a balance. I explained that, but you do not have the states, otherwise, really checking Washington.

**Mr. Allen:** I guess the spanner in the works for either of those two models is the growing character of executive federalism, with the meetings of the first ministers. Either way you go, if you weaken the House of Commons by counterpoising it with a very strong elected Senate, then you also have the House of Commons having to cope with the first ministers, and you have problems. On the other side, if you proportionally represent the House of Commons and you fragment it and put that over against a very strong and emerging tradition of first ministers, then you are also in trouble, are you not?

**Mr. Russell:** I think the experience with coalition governments in Europe is that they are weaker than our one-party governments, but they are stronger than the minority governments we have. They are intermediate. I do not think a coalition government would be drastically weakened in negotiating with the premiers and it might even be strengthened if one of the parties in the coalition had a particularly strong base, let us say in a region of the country where the senior party in a coalition was very badly represented. It might give the government as a whole more authority to say it is speaking for all of Canada in a coalition of that type.

I could live without proportional representation, to be honest with you, in the House of Commons, as it is. I am putting this forward because I think if there is not an alternative on the table to an elected Senate, the people who are worried about it, and I am very worried about it, will be in a very weak position. I think it is a very popular idea in western Canada.

**Miss Roberts:** If I might return to your comments about the first ministers' conferences



that are to take place on a yearly basis with respect to the Constitution, you have indicated to us what should happen next. What I am interested in is, what in your view should we, as MPPs, be doing? You indicate we should be talking about the Senate and looking at it. What is the process you are suggesting? Do we do that through a standing committee? Do you have any suggestions to us?

**Mr. Russell:** You are a committee dealing with constitutional reform. I saw that on the label on your door. It would seem to me well within your terms of reference—I hope I am not speaking out of order—to discuss among yourselves with a view to making recommendations to your Legislative Assembly what the priorities of this province should be as it goes into the next round of talks, what you see as the most important pieces of unfinished business, what should be on the agenda and what general positions Ontario ought to take.

**Miss Roberts:** In addition to what should be on the agenda, do you also have any recommendation as to how we can keep the process going? Just by a standing committee of the Legislature from time to time on constitutional reform? After we make our report back, there is no indication to the best of my knowledge that as a select committee, we are going to continue from year to year, as is set out for the constitutional ones. Do you have any suggestions as to what we could recommend to our assembly?

**Mr. Russell:** In terms of a reform of your assembly's procedures so that your recommendations get attention?

**Miss Roberts:** That is right.

**Mr. Russell:** I am not familiar enough with those procedures to speak to them. I just hope there is a way in which they can get addressed; that is, your recommendations. I think they ought to be. I believe very strongly that the process of developing constitutional proposals should be a more open one than it has been in the past.

**Miss Roberts:** More open? My question is, do you have any suggestions as to how it may be made more open?

**Mr. Russell:** You have made it more open this afternoon. You have had me here and you are inviting other citizens of the province to come and tell you what we think you should be recommending and I thank you for that.

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**Mr. Chairman:** Thank you very much, Professor Russell. I think you have dealt with a couple of subjects, the Supreme Court and the

Senate, and raised some ideas and issues that we have not reviewed to this point. That will be most helpful as we continue. I was not sure whether you would have the same abhorrence to our continuing for the next 100 years as you were mentioning for the constitutional conference each year. In any event, that is something we will have to address as well. Thank you very much for coming and being with us today.

I now call upon Professor Mary Eberts to come forward.

Welcome to the committee. I might just mention to committee members that Professor Eberts is on the faculty of law at the University of Toronto and also practises constitutional and charter litigation at Tory, Tory, DesLauriers and Binnington, and I believe it goes on.

**Ms. Eberts:** Yes, it does.

**Mr. Chairman:** Perhaps I will stop there. If there is anything else you would care to add, I know you have been active in a number of areas. I will leave it to you how you would like to set that out. We are in your hands as to how you would like to proceed. Please go ahead.

#### MARY EBERTS

**Ms. Eberts:** Perhaps the only thing I would add to your brief introduction is that I have been a student of constitutional process as well as a participant in it for—I guess I started in about 1970 when I came into your former office as a student. I must say that having succeeded you there and having seen the lustre of the reputation you left behind you, this is a committee that is very well chaired.

The history I have with the Constitution, both as a student and an activist, if you will, has given me a particular perspective on the Meech Lake accord and on constitutional process generally. It is from that perspective that I wish to address you today.

I think I have provided to your clerk some copies of written remarks that I will leave with you. The two areas I wish to address today are constitutional process as it relates to Meech Lake and some of the provisions of the accord itself which have given particular unease to women's groups.

Let me begin by saying that although there are almost no accounts of it in mainstream constitutional scholarship or official government texts, women's involvement in constitution-making has a long and significant history. This year is the 60th anniversary of the "persons" case, a decision of the Supreme Court of Canada dealing

with women's eligibility to sit in the Senate and their identity as persons under the Constitution.

This year represents as well the 10th anniversary of women's recent constitutional history; that is, a meeting in 1978 when then Prime Minister Trudeau, in the dying moments of a constitutional conference, gave to the provinces jurisdiction over marriage and divorce. They had not asked for it and it had not been discussed up to that point, but he tossed it in as a concession the federal government was prepared to make. I happened to be hearing a CBC broadcast of that conference and I decided at the time that we were all in for a very interesting few years. I think you will agree with me, after your experiences even of the past few days, that this was right.

Women became very involved in the Constitution in 1978 as the result of that careless concession and it took several long months of lobbying by grass-roots women's groups to stop the federal initiative to concede marriage and divorce jurisdiction to the provinces. They were keenly concerned because a concession of such jurisdiction to the provinces would conceivably put an end to a national divorce law and make enforcement of custody and support orders all the more difficult. So women have at least a 10-year tradition of seeing constitutional law in terms both of grass-roots action and also bread-and-butter issues for them.

Unfortunately, the 10-year period of constitutional renewal that has gone on from 1978 to 1988 has had, for women, several salient characteristics. I speak now both as an observer and a participant in what can be called the underside of constitutional review. I set out my summary of these points at pages 3 and 4 of my paper.

Constitutional decisions of great significance to women are made by men without notice to women, without consultation and in the absence of any essential awareness of women's interests. This is because, in large measure, the political figures and the senior bureaucrats who participate in these processes are men and because there is not an open consultation process prior to decisions being made.

If there is to be any hope of reversing constitutional decisions made in this way, women must be prepared to act on very short notice and with a massive show of strength and solidarity, and they do this on a shoestring. Action attempting to reverse an initial decision ignoring their interests often finds that male decision-makers have become very wedded to the decision that was made and any suggestion of

change to it is greeted with enormous alarm. Resistance to women's concerns about constitutional initiatives ranges from the patronizing "Trust us," to ridicule, misrepresentation of women's position and silencing. Women are also threatened if they do not accept the deal as configured: "Things will get worse."

Point 5 is one that is exceptionally germane to the Meech Lake process and I will return to it in a moment: Although women are told to speak with one voice or run the risk of not being listened to, decision-makers also tell some women that because of their regional, political or other characteristics, they have no right at all to be heard in the debate.

The last two points relate to the gains that women have made and lost in the past 10 years: If any gains are made by women, they are to be regarded as fragile, liable to be reversed without notice or consultation at the next meeting, and gains for women and equality guarantees in general are particularly liable to be sacrificed in the interest of provincial powers. That may be something that is particularly relevant to say in this House of assembly.

This pattern of women's involvement and experience in constitution-making was first evident in the making of the present Charter of Rights. Because of their activism over marriage and divorce in 1978, women were prepared when the federal government tabled a charter in 1980 and they were able to make a significant showing at the House and Senate hearings in the fall of 1980. As someone who appeared before that committee, I can also advise that at that time the collaboration between women inside and outside Quebec was very effective. In the work I did, I worked with a francophone academic from Quebec and worked for a council headed by an anglophone and a francophone chair and vice-chair. The co-operation between the two language groups was impressive and very encouraging.

The changes that were brought into the 1980 draft were not fully responsive to women and to the concerns they had raised. When that was pointed out, we then saw the first round of "Trust us." It was at Toronto city hall in October 1980 that the minister responsible for the status of women told a gathering of the National Action Committee on the Status of Women, "We know you may not like this charter, but trust us." He was greeted on that occasion with some discomfiture from the public hall, I can tell you.

The less known, I suppose, feature of the constitutional debates at that time was that when



"Trust us" did not work, there came a split along big-P political lines that affected a number of women activists, and I have recounted that. Certain women faced an election to choose between their loyalty to the minister and his government on the one hand and the women's constitutional process on the other.

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You are familiar with the resignation of Doris Anderson and the spontaneous happening of the Ad Hoc Conference of Canadian Women on the Constitution in February 1981. Behind the scenes, what happened was that during that period, women known as big-L liberals were effectively silenced. They were either called to loyalty and silenced in the councils of the party or regarded with suspicion in the women's lobby because of their party loyalty, real or imputed.

This was women's first experience of the rule of thumb—I have used that expression quite deliberately with the historical reference intended—that women must have certain credentials or not have certain other credentials in order to speak out on constitutional issues. My experience is that the proponents of the Meech Lake accord have used this technique with cynical deliberation during this past summer's debate on the accord at the federal level.

The ad hoc lobby was successful in having section 28 inserted into the charter, but that was only one of a number of serious items that were on the women's agenda in 1981. No sooner had it been added to the charter, however, than section 15 and section 28 were made subject to the override that was added after the famous meeting of the first ministers and attorneys general in the Chateau Laurier hotel in Ottawa—another overnight special—where the November accord was drafted, giving the provinces and the federal government an override on the charter's guarantees. We do not know whether the first ministers actually agreed to put both of those terms under the override, but by the time the drafters were finished with it, they both were under. Again, once the drafting was done, the political authorities were very loyal to the drafters' work.

In the subsequent lobby that women had to mount to try to get these sections out from under the override, we were told, "There will be dire consequences to women if you are successful. We need the override to protect affirmative action." Women were directly pitted against the provinces. Some say this was the result of deliberation on the part of the federal government, but none the less that is what happened and it is happening again in the Meech Lake debates.

Interestingly and ironically, women were told that the override could be a benevolent instrument to relieve against wrongheaded decisions of the Supreme Court. Six years later, in 1987, women were told that the Supreme Court was going to be a benevolent instrument to improve any of the flaws that were left in the Meech Lake accord. It was a very quick volte-face on the part of political authorities.

Let us turn now to the process of formulating and approving the Meech Lake accord, which exhibits the same features but in a somewhat more virulent form.

It is certainly true that for two years prior to the accord's being drafted, Quebec's five conditions for adhesion to the Constitution Act, 1982, had been clear and the Edmonton conference had dealt with them fully in the public eye. Yet at no time before its signature was a draft of the accord containing clauses 2 and 16, the source of so much concern for women, made public for discussion and comment. I know people tend to laugh at lawyers and their nitpicky ways, but one of the best ways of finding out what a deal is is to look at the way it is written down. We saw the prospectus, if you will, but we did not see the deal until after it was struck.

Effectively then, women were excluded from the runup to the Meech Lake meetings and they never got a chance to comment on what subsequently turned out to be so much trouble. Again, we had meetings with first ministers and officials where the population of women was very sparse. As far as I understand, there was no effort made to have a compensatory complement of people knowledgeable in minority issues at the Meech Lake accord discussions.

Once the accord was made public and women started commenting upon it, we saw measures that were designed to, if not stifle debate, then at least cross it up so thoroughly that it was not going to be very effective.

High on the list of deterrents to real debate is the threat that any change to the accord will make it unravel or fall apart. Women who look for change are portrayed as potential wreckers of Confederation. This has happened no more clearly than when Prime Minister Mulroney endorsed the comments of Lise Bissonette who said that Anglo-Canadian women were a Trojan Horse for the foes of Quebec's enhanced participation in Confederation.

Women's reaction to those comments was very swift, because the women's movement in Canada has for several decades worked both inside and outside Quebec to improve the status

of women and women's national organizations have been, I would think, in the forefront of some of the difficult efforts to bridge the gap between English-speaking and French-speaking Canadians. For women's groups to be so insulted was really quite spectacular.

Strongly linked with the portrayal of women critical of Meech Lake is the assertion by the federal government and the special joint committee that Quebec women are the only women whose voices count on the issue of whether the "distinct society" provisions of the accord will have a negative impact on women in Canada. The message sent by Ottawa is, "Quebec women may speak; all others hold your tongues, because the accord is not your business." This, of course, is exactly what happened to big-L Liberal women in 1980 and 1981, but this is potentially much more divisive.

The federal strategy threatens the coalitions between women inside and outside Quebec which have been operating for years in women's organizations, other national citizens' groups and informally, and the reason this has arisen, that this choice is being put, is that the federal government and its closest allies among the provinces have said that no woman can be both for Quebec and for women. They have, by their manipulation of the issue, told all Canadian women, wherever they live, that they must be either for Quebec or for women.

If they are for Quebec, they will drop their complaints about Meech Lake. If they are for women, they will persist with the complaints and run the risk of wrecking Confederation. That is what we are told in order to silence us, and ironically, one of the reasons it works is that grass-roots women in this country have such a strong commitment to a national identity.

The absurdity of the false dichotomy engineered by the federal government becomes clear when we consider what else it is telling women. There is the "Trust us" approach once again. "We really didn't mean to eclipse women's rights and we're sure we didn't." We hear this publicly and in private meetings, but when the government is asked, in the words of Shakespeare, to "make assurance doubly sure" by inserting clarifying language into the accord, it either lapses into this false dichotomy, "Don't ask us to make our assurance concrete; to do so will wreck this fragile bargain," or its other "trust" line surfaces.

This other "trust" line is new since 1981. This time women are told "Trust them," meaning the Supreme Court of Canada. The joint committee report exemplifies this approach, suggesting that

the Supreme Court can smooth out the problems in the Meech Lake accord. The court itself has said in several important charter decisions that it will not give much weight to what the politicians say the charter means, it will go in its own direction. So there is no assurance that the court will put into effect the assurances that politicians give women.

If "Trust us" and "Trust them" does not work, the gloves come off, and this is one of the most disappointing experiences of the Meech Lake debate for women who have made good-faith efforts to participate in constitution-making.

Government authorities controlling the discourse on Meech Lake keep changing the questions women must answer before their concerns will be taken seriously. We are told that the government's experts advise that there are no problems with the accord, yet the expert opinions are never revealed or subjected to public debate. When women respond with expert evidence about the dangers of the accord, the experts are either ignored altogether or flatly contradicted, without reasons.

Yet at times the pretence that there is a legal debate among experts is maintained. Women are told that they will be listened to if it can be shown that there is a problem. I have a faint recollection that I heard this from the Attorney General of Ontario (Mr. Scott) and the Premier of Ontario (Mr. Peterson) earlier this summer. I may have misheard, but it seems to me this was what we were told at that time.

However, as was experienced in the federal hearings, the standard of proof for such a showing is readily manipulated. The accord itself says that section 16 is there to ensure that the "distinct society" clause does not "affect" multiculturalism and aboriginal rights provisions of the charter. But when women show that their equality rights could also be affected by the accord and ask for the same reassurance, they learn that now, to be affected is not enough; women must prove beyond a reasonable doubt that their rights will be overridden. When all else fails, the legal positions put forward by women's advocates are misrepresented, as is the case in the joint committee report. Then, publicly mischaracterized, they are rebutted.

Sometimes the strategy is a little different. When women make legal arguments, they are told that we are dealing here with a political question. Attempts to deal with political issues in political terms call forth the invocation of statecraft, which only first ministers can understand.



## 1530

Many commentators will doubtless say in these Ontario hearings, as they have said elsewhere, that the process leading to the signature of the Meech Lake accord was flawed and should not be followed in the future. Their contention is that executive federalism carried to an extreme is no real way to amend a Constitution because it offers no opportunity for consultation on issues of lasting importance. Even the special joint committee recommended changes in the process for the future, although it found no fault with the Quebec round.

I agree with these criticisms and further suggest that the shortcomings of the constitutional process have a particularly serious impact on women and others in the equality-seeking sector, the grass-roots sector, the voluntary sector. My prediction is that the problems already experienced from 1978 to now will be exacerbated if the Meech Lake accord is implemented and particularly if the recommendations of the joint committee are implemented as well.

Let me outline those concerns briefly for you. The accord establishes regular yearly meetings of first ministers and constitutional conferences. They have thus institutionalized the possibility that women and others will have to respond on a regular basis to a *fait accompli* like the November accord or the Meech Lake accord. There are, at the present time, no satisfactory mechanisms to ensure that there can be adequate public consultation prior to the signing of a deal at a first ministers' meeting, so we will be faced again with the idea that we will unravel a constitutional bargain and things will fall apart if we make protests.

Substantial reforms to the largely in-house, intergovernmental bureaucratic process would be needed to allow for prior public consultation. There is an alternative. Governments can make a real commitment to consulting after the fact and come off the idea that a bargain challenged and criticized publicly, and possibly changed, will unravel Confederation. They have to do one or the other or the process will not work. There cannot be any more of this manipulation by false crisis that has been the hallmark of the Meech Lake process.

Whether there is a commitment to prior or subsequent consultation, there is a further prerequisite to effective consultation. That is, citizens' groups and special constituencies must have resources in order to monitor the process. They are volunteers. If they are in groups at all, their budgets are small and already committed,

and making a real contribution to public debate on a year-in, year-out basis will bankrupt them. Particularly, there is a nonmonetary concern that has to be dealt with here. There has to be time for voluntary groups to do the national consensus-building that they must do in-house in order to respond publicly.

One of the things that happened to the national women's groups in the Meech Lake process was that they were not given time prior to the joint committee hearings to do the national consensus-building among the west, central Canada, Quebec, Atlantic Canada and the north that they needed to do to have a sound position. It is remarkable the number of national women's groups who went forward with the position recommending changes to the accord that had evolved from consultation with their national—including Quebec—members, given that they had only a couple of months to do it.

Part of the strength of Canada's constitutional fabric is that there are hundreds of national voluntary organizations seeking consensus within themselves and mirroring that consensus forward on to the national stage. If you do not allow that sort of backup, as it was not allowed in the Meech Lake process, then you lose valuable, important citizen input.

One of the other difficulties that we face is the joint committee recommendation that there be constitutional oversight by parliamentary committees. They have recommended that provincial houses also have constitutional oversight committees that would be the counterparts to those at the federal level, feeding into a process that would brief first ministers prior to their meetings. If you add to the requirement of monitoring the first ministers' meetings, the requirement of monitoring that process, you see that voluntary sector faces an impossible task.

The joint committee suggests that the monitoring process will be beneficial and it will help correct mistakes as we find them, but what we have seen in other quarters, in the United States for example, is that the monitoring process may well be retrograde. There were some significant women's rights decisions recently made by the Supreme Court of Canada, and it is chilling to think that we will have to protect them in a parliamentary monitoring process from being put on the conveyor belt to constitutional reform by a House that does not agree with them at the moment.

So the charter oversight functions that are proposed in the accord, in the House of Commons and at the provincial level, will

require a real commitment on the part of government to make public participation a reality instead of just a myth.

Let me turn now to the accord and equality rights. As I believe Beverley Baines did, I will address only the issue of section 2 and section 16 in my comments, although I can do questions on the other parts of the accord. I do not want to be understood to be saying that there are no problems with the rest. This is just the focus of concern.

You all probably know section 2 that is proposed to be added to the 1867 act off by heart by now, even after a few days of hearings and meetings, and it is certainly burned into the brains of a number of women's advocates after the past few months. One of the main things that has been impressing itself on women interested in the constitutional process is that one made earlier, in page 4 of my paper. Gains made by women should be regarded as fragile, liable to be reversed without notice or consultation. The gains that were made by women and now face reversal by Meech Lake are the equality guarantees themselves. They did not come into effect until 1982 and 1985, and already in 1987, they face another substantial constitutional counter-weight.

You are probably by now broadly familiar with the process that the Supreme Court will go through when assessing whether there is a violation of equality rights. Someone goes forward complaining of the violation under section 15. That person must establish that there has been a difference in treatment between her and other people similarly situate and that this difference has resulted in some harm to her.

There is a lot of confusion in the jurisprudence now because the Supreme Court has not ruled on what else you have to show. It only heard argument about that in October 1987. But in British Columbia, the Court of Appeal also requires that you show that this harm you have suffered is unreasonable or unfair in the circumstances. If you get through all those hurdles, then the onus shifts to the government to justify the legislation under section 1 of the charter, and under section 1 there is a very thorough inquiry by the court.

You see the range of subjects that the court looks at, starting on page 20. It looks at the purpose of the law, its effects on the individual and whether the effects are proportionate to the worthiness of the purpose. They will not let an individual suffer inordinate harm to support a

frail constitutional purpose. They balance the two.

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In looking at whether the object of this particular legislation is constitutionally worthy or not, the Chief Justice has said they will look at "the character and the larger objects of the charter itself, the language chosen to articulate the specific right or freedom, the historical origins of the concepts enshrined and"—this next one is very important as far as Meech Lake is concerned—"where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the charter."

So you do not just look at equality rights or the purpose of a particular law; you look at the whole constitutional system, what impinges on equality rights. You make your decision about whether equality rights have been violated on the basis of what else is going on in the Constitution.

Women see now section 2 is going on in the Constitution and there are several ways in which—like Tuzo Wilson's great theory of plate tectonics—these sections of the charter will sort of move around and bump into one another, and the moving around and the bumping into one another is what women are concerned about.

Now we get into some sort of technical heavy weather here. When you look at the analysis that you do under the charter, there are several ways in which the "distinct society" or linguistic duality clause is going to have an impact on that analysis. Looking first at section 15, you see that this is where the plate tectonics comes in. The separate school funding reference has said, "The charter does not render unconstitutional a distinction that is expressly permitted by another part of the Constitution." So there has been a great debate about whether section 2 actually allows a distinction in favour of linguistic duality and the distinct society, or whether it is just a canon of interpretation.

Peter Hogg says it does not allow a distinction. Other people say that it does. The debate goes on. But there is at least some possibility that this general principle enunciated in Bill 30 may be brought to bear on that issue of section 15 versus section 2.

But even if it is not brought to bear, you still have this overall issue that equality rights may well be looked at in light of what else is going on in the charter. Particularly if the Supreme Court adopts the analysis that British Columbia has come out with in its Court of Appeal, you say, for example, that a particular law treats you differ-



ently and harms you and then the court asks you to prove that it is unreasonable or unfair that it does so. The court may well then say it is not unreasonable and it is not unfair because it impinges on your equality in the interests of the distinct society, so it is not unfair.

If the Supreme Court of Canada adopts the BC approach, then section 2 has a very clear pathway into section 15 analysis. Even if it does not, there will always be an entrée for section 2 when you get to section 1, the great constitutional balancing act. I have put on page 22 what I think has happened to section 1 of the charter as a result of the Meech Lake accord. It has been rewritten and it has been rewritten as if it looks now like this:

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society committed to linguistic duality and the promotion of Quebec's distinct society." I think everything will be evaluated on the basis of that clause now, instead of on the basis of what section 1 now says.

The joint committee in its report took the position that there was really nothing to get alarmed about here; it is just constitutional analysis as it always has been, the same old pop-stand business as usual and we do not have to worry about section 2 having any more impact on section 15 than any of the other sections in the charter that are already there and make an impact on it.

I am trying to help my grade 4 nine-year-old understand some basic math at this point and I think that her workbook might usefully have been sent to the joint committee, because the simple mathematical fact is that a right qualified by a certain number of factors becomes more qualified when more factors are added to the pool of qualifiers. So that if you have a basic right now qualified by its possible collision with six things and you add to that a seventh thing, the right is more qualified than it was before.

Progressive addition of more qualifications on equality rights will dilute them, even if it does not change the basic analysis applied to charter questions. So there is mathematics. There is also weight. Look at the weight that the court will give the "distinct society"/linguistic duality clause. Look at the weight that governments have already given it. They have said: "This is make it or break it for Quebec in Confederation. This is a signal matter of nation-building." Those comments will not be lost on judges. Even judges 25

years from now will have those comments in the historical record, which is now almost always filed in constitutional cases.

In the Bill 30 case itself, the Supreme Court of Canada was very inclined to give significant weight to what it styled a fundamental constitutional compromise. So not only have the framers of Meech Lake added another factor that is going to collide with section 15, they have added a factor of significant constitutional weight.

There is one last little point here. It is that they also put in section 16 of the accord, and in the face of that clause, their argument that section 2 adds no new threat to existing rights breaks down. Why did they put it in if existing rights are not threatened and if they did not want to safeguard some existing rights from the impact of section 2?

There really has never been a satisfactory explanation for protecting aboriginal and multicultural provisions from the reach of section 2 and not protecting equality rights. All of the explanations break down at some point. We are told, "Oh, well, they are put in there because multicultural guarantees are interpretative provisions, like section 2, and therefore we have to protect them." But the aboriginal guarantees that are included in section 16 are matters of substance, not interpretation, so that rationale breaks down.

Then we have the wonderful illogic of the special joint committee, and I have set it out on page 24. They say, "Many of the constitutional experts that appeared before us testified that section 16 is unnecessary," and you have probably heard that too. "Certainly it generates more heat than light. Adding section 28 of the charter to it would accomplish little because section 28 only guarantees equal application to men and women of rights and freedoms referred to elsewhere in the charter." I think that differs from what the evidence before your committee has been about section 28. "But reaching into section 15 of the charter to add gender equality rights"—actually to make it mean something—"to the 'protected list' while leaving all other charter rights 'unprotected' would be"—this is my favourite phrase in the report—"even more arbitrary." Implicit in the use of the phrase "even more arbitrary" is the acknowledgement that section 16 is already pretty arbitrary as it stands.

The potential for mischief inherent in section 2 of the accord can be illustrated by an example. Now, I know Professor Baines did not want to give you an example and I offer this one with enormous diffidence because I have been

through this example wringer several times, and the treatment accorded examples in the summer 1987 round of Meech Lake accord discussions is pretty sobering.

Women were told that, without examples of what could go wrong, women's arguments were unconvincing. If examples were offered about what could go wrong, women were described as racist, unrealistic or anti-Quebec if they contemplated any legislation by Quebec that put the distinct society ahead of women's interests. If they suggested that any other government could put linguistic duality ahead of women's interests, the examples were styled as speculative or absurd because the prospect of any government doing anything unconstitutional was remote.

Responses like these ignore Canadian history. Governments in this country have all from time to time done things which courts have found to be unconstitutional. They also ignore the essential nature of an example. It is by definition speculative because the events in it have not happened. Criticizing women's examples for being examples is the height of constitutional doublespeak, and we got to be pretty familiar with that.

The present example, I hope, will remove some of this speculative business, this "Governments do not act like this" approach, because it is drawn from an existing government program that is now facing constitutional challenge under the charter. This is a federal program sponsored by Employment and Immigration Canada. It provides subsidized language training for recently arrived immigrants, giving tuition subsidies and living allowances to qualified persons so that they can learn one of the official languages.

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Women are effectively precluded from receiving living allowances in a large number of cases by several rules in this program. One of the disqualifications is that no sponsored immigrant can receive language training, and most of the sponsored immigrants are women.

Another rule says that the subsidies go to labour-destined immigrants, but only one person in a couple can qualify in spite of the reality that most immigrant couples have to have both people in the workforce in order to get started. The people who are usually picked are the men in the family.

Third, subsidy is not available if language training is not needed for entry to the labour market, and so women who can go into job ghettos—cleaning buildings, working sewing machines, doing light manufacturing—where

they can work with people from their own country in their own language, are disqualified from learning English or French because they do not need to.

There are a number of local and national women's groups that are now doing the community organizing necessary to bring a charter challenge to this program.

But assume for a moment that the government of Quebec were to exercise the powers given to it under the Meech Lake accord itself to take over the integration of immigrants into Quebec society. They are allowed to do that, and all it takes, according to Meech Lake, is an agreement. Assume as well that Quebec were to leave most of the elements of this present language-training policy as they stand. So we have the possibility that there would be a federal program and a Quebec program that have the same elements. We also have the possibility that women could bring charter challenges to both of those programs.

So what is going to happen? The Quebec government could justify its program on the basis of the "distinct society" clause because promoting the integration of immigrants into Quebec society and their learning of French enhances the distinct society. The federal government could defend its program only on the basis of linguistic duality because integrating immigrants into the two official language groups does preserve linguistic duality. So would there be two separate court rulings on essentially similar programs? And how will the court sort out whether the linguistic duality clause has greater strength than the "distinct society" clause or not?

What if the Quebec program were upheld by the Supreme Court of Canada on the basis of the "distinct society" aspect of its defence and then the federal program came to the same court? Would the matter be regarded as determined, or could there be a different decision about the same program? What if it were decided that one of these programs violates women's equality rights and one does not? Where does that leave us?

The hypothetical highlights, I hope, an important issue that is almost always ignored in the discussion of the Meech Lake accord: that is, that the Supreme Court of Canada is still the final court of appeal for all of Canada, including Quebec. Cases from Quebec dealing with conflicts between sex equality and the distinct society will, once decided by our highest court, be in our jurisprudence for citation in other sex equality cases arising in other parts of Canada.



It is thus not at all true, even as a technical matter, to say that the relation between sex equality and the distinct society is a domestic matter for Quebec only. As long as the Supreme Court is the highest court in Canada, its jurisprudence on matters arising inside and outside of Quebec affects us all. We have seen in the court's recent pronouncements that its judgements make philosophical and value statements, they do not simply reach conclusions. The judgement of last week that has been so widely reported in the press is a classic example of that.

It will not help the women of Canada to have from the Supreme Court a clearly articulated statement that the interests of women must be subordinate to those of their national or linguistic group, because in a pluralistic society with many national and linguistic groupings and strong constitutional and accord protection for multicultural values, such a statement will not be confined to Quebec.

I will end on a historical note. It is not all that historical; it is only 1974. The Supreme Court of Canada faced the question of whether a woman's equality interests should prevail over the interests of the group of which she was a member. The case of the Attorney General of Canada versus Lavell is a very famous constitutional decision. Indian women challenged the statutory removal from them of their Indian status when they married non-Indian males. The majority of the court ruled against the women's equality argument, saying that constitutional jurisdiction over Indians gave the federal government the right to impose requirements for having or keeping Indian status that discriminate against women.

That the Bedard and Lavell case is about the conflict between sex equality rights and one type of distinct society is clear from Justice Laskin's description of the argument in the case, and I set it out:

"It was urged, in reliance in part on history, that the discrimination... is based upon a reasonable classification of Indians as a race, that the Indian Act reflects this classification, and that the paramount purpose of the act to preserve and protect the members of the race is promoted by the statutory preference for Indian men."

That was the successful line of argument in the Bedard and Lavell case. It is widely recognized by jurists and constitutional scholars that the language of section 15 of the charter was designed to prevent a repetition of the unfortunate reasoning of the Bedard and Lavell case. That has been recognized by almost every

constitutional scholar to comment on section 15, and it has been accepted in a lot of the Court of Appeal decisions to deal with the terms. Now, only two years after section 15 comes into force, women contemplating the Meech Lake accord are wondering whether the wheel has come full circle.

**Mr. Chairman:** Thank you very much. I think it is safe to say that we will have a period of questions, but you have put a great deal into that paper and I know we are going to be reflecting on many of those points for some time to come. We really appreciate the effort that undoubtedly went into that overview of many aspects of constitution-making.

Just before we go to questions, one observation is that perhaps a recommendation we need to make is that first ministers not be allowed to meet between midnight and breakfast. It seems from the examples you have been able to relate that that could lead us into all sorts of difficulties, and that might be one place to start.

**Mr. Cordiano:** Professor Eberts, thank you for your presentation. There is certainly a lot to think about in it, and we cannot possibly talk about all the issues; at least, I will not. I am going to deal specifically with your remarks on section 16.

I understand that the premise or the thesis you are putting forward is that there is a balance in the Constitution between conflicting sections, if you will, that equality provisions in the Constitution have to be balanced against other sections in the Constitution and that this is how the courts will look on decisions. In trying to make decisions, they will refer back to sections with regard to that and, as you put forward, I believe, section 16 adds one other dimension to that balancing act.

First, I would just like to talk a little bit about what Professor Baines said to us the other day in her submission. She put forward the notion that women form a distinct culture. That was her premise. I take from that that women can be considered a distinct culture or a cultural grouping, that there is a common set of cultural values, if you will, that women share. Would you agree with what she was saying the other day along those lines?

**Ms. Eberts:** I think her argument has a lot to recommend it. Scholarship over the past 25 years, which is about the lifespan of scholarship on women's issues in the academy, has shown that women may have a different way of approaching moral issues. Carol Gilligan from Harvard has said that. Certainly the historical work that is being done on women in Canada and

North America shows that women's institutions have played an extremely important part in the preservation and the enhancement of such equality as women have managed to get.

Because the scholarship is so recently on the scene, I do not know that we really yet fully understand all of its dimensions, but I think Professor Baines is certainly on a track that sounds to me very interesting and logical.

**1600**

**Mr. Cordiano:** When I look at section 27 of the charter—and, of course, section 16 refers back to section 27 of the charter and brings it into the Meech Lake accord—I am looking at what that means: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." I think that means all Canadians, whether French, English, men, women, whatever part of the world you come from; so that would include all Canadians.

Having said that, I would think that section 16, as a result of that, draws women into the accord because it refers to all Canadians, any cultural background, any heritage, and that would include women. Do you follow what I am saying? I think there is some merit to the argument that, in fact, women can be considered a cultural group. If that is the case, section 16 specifically refers back to section 27 and draws women into the accord as well.

**Ms. Eberts:** I think your observation, for me, falls into the category of, "Wouldn't it be nice if that were the case?" Lots of suggestions about how to protect women's interests now do that, but I fear I must add a cautionary note about the guarantees of section 27. One of the reasons for seeking to have section 28 included in the Charter of Rights was in fact that section 27 had been included in the Charter of Rights. That much is clear from the resolutions of the ad hoc conference in February 1981.

The concern that motivated women at that time and caused them to want an affirmation that charter rights are equally available to male and female persons was the concern that, in some of the cultures represented in Canada, the position of women is traditionally or historically subordinate to the position of men. We have not yet, I suppose, seen the full tuning in to egalitarian Canadian values there. I think you can appreciate that women are somewhat leery of the section 27 guarantees because of the fear that they may be used to affirm discriminatory elements, not to protect women.

I can give you one example, although every time I give an example, I quail. When the Principal Group Inc. financial scandal broke out west, you will remember reading in the paper about all of the large religious communities there who had invested and lost money. The Report on Business stories about those communities indicated that the management of all the financial and administrative business of those communities was in the hands of their male elders; women played no part in the administration of those large communal enterprises.

I think it is that type of multicultural heritage, if you will, that women had in mind when they were worried about the affirmation of multicultural heritage in the charter. By this, I am not saying that all people who have a multicultural heritage are sexist. I do not want to be taken to understand that, but I am saying that was a concern. I do not want to put all of my constitutional eggs in the section 27 basket.

**Mr. Cordiano:** But if you agree with the definition of multiculturalism as including a woman's culture, then that is very different from what you are speaking to. If multiculturalism includes all Canadians, then that means every Canadian and in different cultural groupings, and you can ascribe to a woman's culture, if you will, under a multicultural definition that is all-encompassing.

It does not speak to identifying one cultural group and saying it has discriminatory practices. That is the only point that I am making. You can point to that and say, "We do have a woman's cultural grouping that is very different from another cultural grouping." That too has to be considered as a very plausible cultural group.

**Ms. Eberts:** I have not ruled it out as an argument that even I might make some time in a constitutional case, but I do not know that I would regard it as the rock upon which I would like to build my church.

**Mr. Cordiano:** In the light of the fact that we are referring to section 16, I think that point can be made. Certainly I know that the multicultural groups will say that section 16 does nothing to advance their cause.

**Ms. Eberts:** That is indeed what they say.

**Mr. Cordiano:** Therefore, I do not know that they want to put all their eggs in that basket either. All I am saying is that section 16 brings that grouping or that section of the charter into the accord. Consequently, if you follow what Professor Baines was saying, that there is a hierarchy of rights, we are lifting that point up to



section 16 as well, that women can be included in that section.

**Mr. Breagh:** I appreciate the kind of controlled anger that I saw here this afternoon. But then I have seen you under fire before, so I anticipated that. One of the things that Professor Baines suggested the other day as being useful for us would be to assist in the preparation of some kind of a reference which might sort out all these wonderful opinions that we have been hearing. Does that strike you as being a reasonable approach for a committee like this to take, to try to gather as much expert legal testimony as we can on the record and then, in the end, make our own judgement call and perhaps then do a reference to see if we can get some final word on it?

**Ms. Eberts:** I think, just as a practical matter at the provincial level, your reference would be from the government to the Ontario Court of Appeal. You might have a time problem, given the deadline for affirmation of the charter, by the time it goes from the provincial Court of Appeal to the Supreme Court of Canada. I understand there are two time lines. One is the outside limit and the other is the practical time line that is even sooner than 1990, and I do not think a reference fits into that.

If you are considering that option, you would have to give very serious consideration to the question of what questions you would refer, because certainly the experience of women's advocates over the summer was that you could never tell which shell the pea was really under. The question always changed, and you could find for political purposes that you would frame a series of questions and you would get a very nice decision from the Supreme Court of Canada, and then it would be decided that those questions were not the right questions. So any reference that went to the Supreme Court of Canada, I would think, would have to have multi-party agreement as to what the questions were, which in itself is a large act of political engineering.

Then there is the issue, from the point of view of equality-seeking groups, of who would be allowed to argue in the reference case. Certainly all the attorneys general would be present, but there are a lot of groups that would like to go and make arguments about the meaning of the Meech Lake accord, if only to have the Supreme Court tell them that their arguments were terrible. The list is likely to be so long that the Supreme Court would be in great distress because of such a reference.

Ideally, there would have to be discussions between the political authorities and groups and constituencies outside regular political channels to see if they could be lined up and the people sorted out whom everybody would recognize as having a right to argue in the reference. That, too, is very political. It is not just a cut-and-dried legal question, just as the 1981 constitutional reference that led to the November accord was not a cut-and-dried legal question.

#### 1610

**Mr. Breagh:** As you are aware, we have a bit of a political problem of our own in that the Premier has said, "You can do whatever you want, but there will be no amendments." This is not a usual situation for us to find ourselves in, so we are kind of groping around. If we cannot move amendments, what can we do? What could a legislative committee put in place in the way of recommendations that might assist the process that most of us see as being badly flawed, if not quite morally reprehensible?

So we are groping for what we could do that would be positive in nature, that would assist people, that would put on the record all of this opinion in a formal way so that people could then have their subsequent arguments. The reference seems to me to be one approach that I would not like to rule out just yet, although you point out that it is not quite as easy as it might first appear to be.

You mentioned in your presentation that there will be what I read as an attempt by the federal committees to aid the process on down the line, that legislative committees would do that. You point out, I think quite rightly, that this may in fact make the process worse. It all depends on how people go about that.

Let me put it this way. If this committee wanted to say, "To hell with everybody, we will put an amendment"; one of the first major problems we would have is how in the world we would word an amendment. Where would we turn to get such advice? How would we go through a consensus-building process? So that for now we may get to a conclusion at the end of this process that we are not in a position to do that, but we had better get ourselves in a position to be able to do that the next time around. How do we get from here to there?

**Ms. Eberts:** I think you will find, when you hear from the community groups that will come and talk about the Meech Lake accord, that there is presently on the table a relatively limited range of suggested solutions to the section 2-section 16 problem. One of those is that an amendment be

moved clearly making the accord subject to the charter. That is the mega solution.

Then moving down from that is the recommendation that section 15 and section 28 of the charter be included in section 16 of the accord; moving one step down from that is the recommendation that section 28 be included in the accord. That is the option that does have the support of the women's groups inside Quebec; at least they have said they will not oppose that in the interests of comity with English-Canadian women.

I think those are your three options, and you will doubtless hear comment from the community groups about which of those options you should recommend.

As to the rest of the process, I think that this committee has a marvellous opportunity to correct the record that was left after the federal hearings. A comparison of the transcripts at the joint committee and the report of the joint committee reveals several significant discrepancies between what was told to the committee and what they said was told to the committee. The fact of life of constitutional litigation now is that all these reports will one day be sitting in front of the justices of the Supreme Court of Canada. So this committee can correct the record and report fairly on what is said about the concerns and would thereby be doing an enormous service to those concerned with this process.

To go further than that, you have the opportunity to recommend changes in two areas. One is within the government's own intergovernmental process itself. I understand you have had some submissions from the Ministry of Intergovernmental Affairs and I know that there is experience on this committee in that area, including such things as building into the Intergovernmental Affairs' bureaucratic process some consultation with community groups, the concept of advisory panels or councils.

Ontario has always had one sort of advisory committee or another on Confederation. Those could be reactivated and made much more an early part of the process. There could be a commitment on the part of the government to having differently constituted official delegations at intergovernmental meetings. That is all in-house. Then you could give some attention to your own legislative process; about how you would prepare for first ministers' meetings and what oversight you would exercise over the bureaucracy and the Intergovernmental Affairs' process.

Lastly, the thing that legislatures always hate you to talk about, you could talk about money. You could talk about giving groups who have a demonstrated commitment to the constitutional process the wherewithal to be steady participants in it.

I know from the organizations that I am familiar with how very difficult it was to mount any sort of effective showing in the summer, yet what miracles were performed. But you cannot run a country on miracles, as much as some people think you can.

**Mr. Breagh:** Oh, ye of little faith.

**Mr. Chairman:** We will leave Mike with his faith and move on.

**Mr. Offer:** I would like to continue on in the line of questioning Mr. Breagh has initiated with respect to process.

With respect to your submission, you have indicated two concerns with respect to the joint committee's recommendations on process. The way I read your concerns they are how you are going to monitor submissions to first ministers' conferences; and second is the whole question of this new monitoring process. How are you, how are other groups going to be able to plug in to the able to share their insight, their feelings and their positions when they have these two new processes?

I have just heard the answer to Mr. Breagh's question which was a suggestion as to how the process could be improved. I think you have also indicated that there is a role that we could play here at the Legislature. My first question is, could expand you upon how, in your opinion, we might be able to suggest a process which might meet some of the concerns that you clearly indicate in your submission?

Second, in doing that, what would be the position of having all these new legislative committees and the two federal committees, one monitoring, and how might that in a perverse sort of way hinder what you have recommended? I am just trying to get a handle on what you feel is absolutely, in your opinion, at today's date, the best type of process you could see.

**Ms. Eberts:** Let me start with the end of your question first, the part about how some of these various recommendations might work against one another and hinder each other.

In the long run, if you have several consultative processes going at the federal level, in the provincial bureaucracy and in the provincial Legislative Assembly, and if those are real consultative processes, the net effect of those will be to slow the pace of constitutional change.



That is not necessarily a bad thing. I think other witnesses have said, and certainly Peter Hogg has written, that a constitution is not necessarily something that you change every year.

There has been a bit of a tendency in the Meech Lake accord recommendations and in the joint committee recommendations to treat the Constitution like a collective agreement, and it comes up for renegotiation every year, or as under some joint labour-management committee reviews with various articles that have caused trouble being reported up to the bargaining team every year.

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To treat the Constitution like a collective agreement really worries me a lot. I do not see any hindrance to the constitutional process if you put in safeguards that require broader consultation and those safeguards slow the process down. That is exactly what should be happening. We should not have people going every year and signing deals that then go into the Constitution without a chance for public consultation.

The nature of constitutional change and the nature of constitutional jurisprudence is that it slows the pace of change; it does not hasten the pace of change. People complain about that, but if you consider what Peter Russell just said about the fashions that go through the Supreme Court of the United States or the Supreme Court of Canada, what would happen if you had those changing fashions on a cycle every year. It would be disastrous. You do have to have a slower constitutional process.

Once you admit that and say you can have a relatively slow constitutional process, then I do not think there is anything fundamentally wrong with requiring that it be very consultative. One really important thing that provincial legislatures can do is to have accepted as a convention of the local legislature and local government the idea that the Premier will not go off and sign deals relying solely on his majority in the House to get them through, without discussing them first with the caucus and with the Legislature. The Legislature would have as much right, if not more, to be consulted in advance about these propositions as citizens do.

It is a problem of executive federalism that we are looking at here and a legislature, and particularly a caucus in a majority situation, has that critical role to play in making sure that government is, in the old Baldwin-esque term, responsible government.

**Mr. Breaugh:** She is advocating democracy here. Give me a break.

**Mr. Chairman:** Revolutionary.

**Ms. Eberts:** I knew I would get into trouble if I said that.

**Mr. Allen:** We seem to be not entirely retreating but in a sense retreating into process discussion, and I am not unhappy about that because the process has not been good. I am not unhappy about that because Ms. Eberts has made some very good recommendations and has strengthened some notions that have been going around the committee about some things we need to do in the future in order to improve the process. I think that is all well and good.

I do not know whether it is because it is after four o'clock already and we are at the third day of our first week of hearings and our minds are turning to spaghetti from constitutional consideration already, but oddly enough we have not grappled with the central point you have making, I think, about the problem of women, equality, the Constitution, the charter and the accord.

I regret that we are at the time that we are at because at this point there are obviously some very difficult questions you are putting before us, both at the level of interpreting what has happened already in the process in that respect and also with respect to the issues themselves substantively.

I am sure other members of the committee, like myself, are trying to get their heads around the significance of section 16 in the accord; whether section 28 in the charter has monumental consequence or not; whether the "notwithstanding" in front of the clause wipes out everything else, all the other "notwithstandings," or whether it does not; whether in the interplay of all parts of the Constitution with all other parts of the Constitution, as you put it, as sort of a play of the tectonic plates, somehow or other section 28 gets lost or reduced or does not; or whether the charter has in its own right a kind of paramountcy among the tectonic plates. Those are all big, big questions, and I do not suppose by asking you a few more diddley questions I am going to get much further on that this afternoon.

The other level of the question that has come out this afternoon appears to me to be a question of analogies, whether it is possible to take a judicial decision around native culture and equality rights that somehow wing in from another direction on that culture, impact it and force some kind of resolution. Whether you can take the analogy of what happens in a court decision there and transplant it into the Quebec case and the Quebec round is obviously a nice question. We all know analogies are never

perfect. You, as a lawyer, would not want to press them to the nth degree in any of your arguments.

Likewise, with respect to other cultural entities such as Hutterites in Alberta and investments and what happens in other legal cases; again, and I question it, obviously this sort of paternalism and patriarchalism that resides in both those issues is a major problem for us. It also is evident in both our English cultures in general and our French culture in general and has been in the past, so there is a problem there that has a certain resonance.

Alongside that, there are also certain important and unique elements that are quite different in the Quebec case. Among them is something that I would have thought would have been of some consequence to women in Canada, and that is that at least on balance there seems to have been a somewhat better forwarding of women's concerns in the Quebec context than in other parts of the country. If that is the case, then all the other questions to one side is there not, on balance, something particularly useful to women in Canada to have that aspect of the "distinct society" affirmed in this process and available therefore in the rest of the battle.

That is a long sort of preamble statement plus an observation. I want a reaction on the last point in particular, and maybe you can come back and give us some more about some of the other stuff.

**Ms. Eberts:** One thing did occur to me as you were talking about the jurisprudence and analogies and so on. The Supreme Court of Canada has heard argument in the first case dealing with equality rights. They heard it in October 1987 and it is just a matter of time before they make some pronouncement about the plate tectonics, how section 15 relates to certain other sections and relates to section 1 and what section 15 means.

They will not say anything about section 28, because it did not surface in that case. But one of the things that is really very regrettable about the haste with which this process is being driven forward is that we are going to miss by a few months the Supreme Court's clarification of what equality rights are, if we stick to the *de facto* timetable that has been bruited about of trying to get the accord approved by the summer of 1988 or whatever, because the court may well come out with its equality decision in the fall of 1988 and then one of the big questions marks will be removed.

I do not foresee a case dealing with section 28 coming to the court that quickly, but I do know

that on March 3, 1988, there will be argued a major constitutional case involving the relationship between sex equality and freedom of speech—more plate tectonics—and section 1. That is a case that has attracted a lot of attention in the women's movement and some of the best women legal scholars in Canada and the United States are presenting briefs to the court on that.

Again, haste in this process will miss by a few months the Supreme Court's clarification in a major constitutional case of some of those issues. That is a process concern, but it has a really strong bearing on substance.

### 1630

As far as Quebec women are concerned, it has been very interesting to us, struggling on for women's rights outside of Quebec, to note over the 1970s and 1980s the enormous progress that Quebec women have made. They have been in a number of respects leaders for other women in Canada. People in the English-speaking provinces have had a bit of a schizophrenic approach to the federal jurisdiction. In some provinces the only way you could get any action at all on equality rights or measures of interest to women was through the federal jurisdiction; yet, because of loyalties to their own province, women were not willing to be really centralist once and for all. So there is that issue.

While I laud the progress made in Quebec and while I recognize it fully, on the statement of political consciousness by Quebec women that the "distinct society" is a nonsexist society, I do remember, as a student of history, that Quebec women got the vote in 1940. Quebec women got to be called to the bar in 1940. They got to be called to the bar in Ontario in 1898. These things, like fashions in traditional decision-making, come and go. I hope that we never see a reversal of the trend in any province away from the wonderful strides that have been made in Quebec.

I am talking about eggs in baskets and rocks upon which one builds churches and this sort of thing, and we are talking about a Constitution which is supposed to be some hedge against the politically transitory. I think we have to bear that in mind while honouring the other traditions.

**Mr. Chairman:** Mr. Eves, Miss Roberts, and I think, if there is no one else, that would be the end of the questioning.

**Mr. Eves:** I just had one small point to try to clarify, or ask your opinion on actually.

On page 24 of your presentation, you are talking about your favourite term, "even more arbitrary." As I was reading that, I circled it and it



brought to mind the presentation by Professor Baines yesterday. On page 22 and the top of page 23 in her presentation, she states that "...the starting point must be the inclusion of section 28 in the accord." She goes on to say, "However, I find it difficult to stop with the inclusion of section 28 because I have researched the recent section 28 jurisprudence only to find that the courts consistently read section 28 along with section 15 and with other sections of the charter."

She goes on to put forward the suggestion that "if caution is the key to the accord, and Professor Hogg's analysis of section 16 would suggest that it is, then we must include not only section 28 but also the rest of the charter."

What is your comment on that proposal?

**Ms. Eberts:** By picking up one end of a ball of string and following it through, you do get back to this position. That is the reason there are three alternatives stacked up; because advocates, for example of effective multicultural rights, say you cannot have effective multicultural rights with only section 27 and section 16; you have to have section 15 because that gives you your substantive protections against distinctions on the basis of race, national origin and so on.

Then you have the advocates of other things, like free speech, which are affected by language guarantees, saying, "Why stop at section 15?" I think that the only basis upon which I can suggest limiting the rollback at section 15 and section 28 is the notion that section 15 of the charter is the only part of the charter that explicitly deals with egalitarian rights. They are so closely allied to sections 27 and 28 that they can be seen as a package. Egalitarian rights are in the charter itself made distinct from political and legal rights. It is maybe a formal distinction, but that is at least the way the charter itself organizes them. It seems to make some sense that, instead of splitting up the egalitarian rights themselves, you keep all those together and reserve for a subsequent occasion the issue of what to do with political and legal rights.

That being said, my own hope would be that, either by means of a constitutional instrument or by means of judicial interpretation, the charter will be seen to be pre-eminent over most of the rest of the Constitution.

**Mr. Eves:** My point was that if this committee were even remotely to entertain the possibility of a suggested amendment, it just struck me as I was listening to Professor Baines yesterday that that might indeed be a rather simple, clean-cut, all-encompassing amendment. I just wondered about your thought on that.

**Ms. Eberts:** That is the great selling point of that amendment. It is elegant.

**Mr. Allen:** May I just ask a brief supplementary? If the courts affirm the paramountcy of the charter, is not the simplest amendment, from everybody's point of view, simply to strike out section 16 of the Meech Lake accord?

**Ms. Eberts:** But they have not affirmed the paramountcy of the charter.

**Mr. Allen:** No, but I—yes, yet.

**Ms. Eberts:** No one will know, before you have to make your decision, whether they will affirm the paramountcy of the charter. Scholars will be fighting for years about what exactly was done in the Bill 30 case. Nobody agrees on what was done there. Nobody can figure out for sure whether that made the Constitution supreme over the charter. We are not going to get a quick solution to that.

**Mr. Allen:** But it was just a general view that seemed to emerge among many of the scholars who were here that section 16 really was not necessary anyhow. I gather that multicultural groups are not all that enchanted and one cannot really see that it did a lot for aboriginal groups.

**Ms. Eberts:** The problem with it is that it may not have been necessary, but once it is there you run into that canon of interpretation that every provision in a legislative instrument is supposed to be given a meaning. Once it is there it has to be given a meaning, and it will be.

**Miss Roberts:** My comment will be very brief, in contradiction to what I am going to talk about, and that is the haste in which things have been done and which you commented on so clearly.

My concern is most likely similar to yours, that there are many things to be decided by the Supreme Court with respect to the charter of 1982. We are faced with a decision now that has to be made. It is imperative that we make the decision one way or the other; whether we decide to amend it or what we do, decisions have to be made.

Just indicate to us, if you would, even though we do have consultation with all the groups you have suggested and many more we can think of, I am sure, what happens in the future when it is presented to the executive or to those people who are going to decide, and what is going to occur once they get together again?

Perhaps one of the easy ways of dealing with it would be to determine that those executive meetings not be in private, that they be in public, so that the discussions be heard and that each

person is held accountable to whatever extent it is. Most likely, if that had happened in this particular case, people would be sure of the intent and the reasons and what had been discussed in the background. It is just a suggestion; I am sure it will be helpful if, in the future, we are going to make some changes, that those changes can deal not only with this but we can also suggest what happens at the other end.

**Ms. Eberts:** During my brief stint as a baby bureaucrat in the federal-provincial affairs secretariat, I was far too lowly ever to go on one of these federal-provincial conferences. I understand even the ones that are televised have a lot of corridor discussion and backroom chat. You cannot keep people from meeting in people's hotel rooms or the kitchens of their suites, and so on.

I think televising the meetings would add a certain useful amount of sunshine to the process. But the federal concession to the provinces of jurisdiction over marriage and divorce was done at a public meeting. It was the most bizarre thing that had come along in ages. Who knows what the backdrop to that was? I think the openness of the meetings is part of an overall package of making the executive more responsive to other concerns. I think it is very important, but I do not think it is the only thing that needs to be done.

**Mr. Chairman:** Mr. Morin wanted a quick question.

**Mr. Morin:** Possibly the last question too. We have heard from other witnesses about the importance of national reconciliation. What is your assessment of the need to bring Quebec back into the constitutional fold?

**Ms. Eberts:** I am a person who has been for a long time firmly committed to federalism and very interested in having Quebec as a partner in Confederation. I am concerned that the Meech Lake accord and the free trade initiative are happening at the same time, because I think that while the federal government may believe the Meech Lake accord and the free trade initiative will have an overall binding effect on Confederation and keep Quebec in Confederation, there is a real possibility that it could have a centrifugal effect; that is, if the Meech Lake accord brings about a more decentralized, more loosely knit federation, a more porous society, and if the free trade agreement makes it not as necessary for any province to go through the federal structure to have access to other markets, then the utility to Quebec of Confederation may be reduced.

I say this somewhat tentatively, but the fact that both of these initiatives are going forward at

the same time worries me greatly. I think that any benefit one sees from the Meech Lake accord may well be lost because of free trade. Certainly, Mr. Parizeau has lost no time in coming forward with some fairly marked statements about what an independent Quebec would do. I am very concerned about that.

**Mr. Morin:** Do you mean to say that the accord will not unify Canada?

**Ms. Eberts:** I think there will be a short-run, symbolic and quite important sort of gesture of national reconciliation but that we have to be as careful as we can to look five years down the road and see what the actual working out of the mechanisms that are in there will do.

**Mr. Morin:** In free trade.

**Ms. Eberts:** It is very difficult.

**Mrs. Fawcett:** I am not quite clear. Would you be recommending that we reject this and start over again or that we amend it?

**Ms. Eberts:** My preference would be for an amendment. Just think, women constitutional activists have always taken a positive approach to these things. When we were doing constitutional reform in 1980-81 we said, "Let us not make entrenchment an issue; let us just talk about what should be there." Similarly here, at the joint committee hearings there was the uniform approach on the part of women's groups, "Let us not make an issue of the question of whether there should be Meech Lake or not." Most of them said: "How wonderful Quebec is accepting to be a formal part of Confederation. Let us talk about the sequel to that and how we can protect the interests that are not protected well now."

I think another option, short of rejection, is delay; but that is something the political ramifications of which I have not really explored.

**Mr. Chairman:** Professor Eberts, we are very grateful for not only the paper but also the answers to our questions. The Quakers have a term about seeking a way, that the truth is not something that is just sitting there, that there are a number of routes we may follow. I think that at the end of this first week of hearings our minds are certainly full of many thoughts and many ideas.

One of the important aspects of the process that we are in right now, and perhaps this is important to state at the end of this week, is that ideas and time can have a way of bringing about new ideas and new relationships. I think we have felt as a committee that it is awfully important that we not reject out of hand where perhaps some of those ideas may lead us.



Obviously and frankly—and I would not want to mislead you or anyone else—there are outside this room some realities which at some point in time we as individuals, as members of particular political parties, are going to have to grapple with. But as we go through this process, I think we have an obligation to our oath as legislators, an obligation to the motion which set us up, to explore these ideas and to explore these ways. I

think you have presented to us this afternoon a great deal of food for thought, which we will take with us and think long and hard about. Again, we are most appreciative for your coming today.

**Ms. Eberts:** I thank you all for your thoughtful and very considerate questions and attention. It has been a very positive experience.

**Mr. Chairman:** Thank you.

The committee adjourned at 4:47 p.m.

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**CONTENTS****Thursday, February 4, 1988****SELECT COMMITTEE ON CONSTITUTIONAL REFORM****Chairman:** Beer, Charles (York North L)**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breagh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Clerk:** Deller, Deborah**Staff:**

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:****Individual Presentations:**

Smiley, Dr. Donald V., Distinguished Research Professor of Political Science, York University

Cook, Ramsay, Professor of History, York University

Russell, Peter H., Professor, Department of Political Science, University of Toronto

Eberts, Mary, Legal Counsel; with Tory, Tory, DesLauriers and Binnington







No. C-4

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

#### **First Session, 34th Parliament**

Tuesday, February 16, 1988



Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, February 16, 1988**

The committee met at 10:07 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** If we might begin with this morning's session, I would like to invite the Honourable Stephen Kakfwi and Ted Richard to please come forward. The Honourable Stephen Kakfwi is the Minister of Aboriginal Rights and Constitutional Development for the Northwest Territories and Mr. Richard is a member of the Legislative Assembly.

We are very grateful to both of you for coming to Toronto and joining us this morning. We also want to thank you for the material which you have provided to us, both the copy of the presentation you are going to make as well as some informational material regarding the Northwest Territories, especially the 1983 constitutional accord on aboriginal rights. Committee members will be interested in getting into some questions in that area once you have concluded your presentation.

I think at this point I would simply turn the proceedings over to you and would ask you to go right ahead. We have two hours and we do want to make the best use of that time to make sure that you are able to get your points of view over to us and that we have a chance to ask some questions. Perhaps with that as preamble, I would turn it over to the two of you to proceed as you wish.

### LEGISLATIVE ASSEMBLY OF THE NORTHWEST TERRITORIES

**Hon. Mr. Kakfwi:** We have a presentation to make this morning and I would like to begin by explaining that we share this opportunity as members of the Legislative Assembly of the Northwest Territories because we are of a government that is a consensus government. We do not have party politics in the Northwest Territories and because of the seriousness with which we view this whole issue, in our concerns about the Meech Lake accord, we have taken the opportunity to do a presentation together. I wanted to mention that before I begin.

I thank you and say good morning to members of the committee. My name is Stephen Kakfwi and with me is Mr. Ted Richard. We are here

today on behalf of the Legislative Assembly and the government of the Northwest Territories.

As nonresidents of Ontario, we wish to thank you for permitting us to address you today. We realize there must be many individuals and groups in Ontario that will want to make presentations before this committee and we especially appreciate the helpfulness which your staff has extended to us. As you may know, we have just begun the winter session of the Northwest Territories Legislative Assembly and your staff assisted by scheduling this presentation at a time which is convenient for us.

Before we begin a detailed examination of our concerns, we want to take a moment to explain what we believe are important differences between our presentation and the other presentations you may have heard since February 1. Some of the things we are about to say might offend you, but we believe they must be said.

We understand that you have had no presentations from other provincial legislatures or governments. You will be hearing from the Yukon later this afternoon. It might strike you as unusual that elected representatives from another jurisdiction are appearing before your committee. It is unusual, and with due respect to each of you, it is for us degrading. It is degrading for Mr. Richard and I to have to travel 3,000 miles to tell you that the people of the Northwest Territories have again been ignored by the rest of Canada.

We say "again" because in November 1981 the entire Legislative Assembly of the Northwest Territories travelled to Ottawa to protest our exclusion from constitutional conferences which had also bargained away our rights as Canadians. It is degrading for us to have to try to convince you that we are part of this country.

We are not Algonquin Park north. We joined this federal union in 1870. The Northwest Territories has been carved up to create Manitoba, Saskatchewan, Alberta, northern Ontario, northern Quebec and the Yukon. But the Northwest Territories still does exist. Believe me, there is a government of the Northwest Territories. There is a Legislature of 24 members. We do not represent some single-interest group. We are here representing a public government, not a municipality but a public



government with jurisdiction over a land area that embraces one third of Canada.

We find it degrading that the Legislative Assembly and the government of the Northwest Territories have to resort to this sort of forum to receive a hearing. Will it be a fair hearing? We understand that the Premier (Mr. Peterson) has already advised that he will not be considering the concerns of women, natives and northerners until the Meech Lake accord has been ratified. In other words, until it is too late to make changes.

So why have we come here today? We have come to talk about Canada and about the Meech Lake deal. We urge you to take a broad view of your mandate and ask that you recommend in your report the amendments to the proposed 1987 constitutional amendments which we will suggest in this presentation.

The constitutional amendments of 1987 are unacceptable to the Legislative Assembly of the Northwest Territories for the following major reasons:

1. The amending formula in part V of the Constitution Act 1982 will be changed to give every province powers to interfere arbitrarily with the constitutional development of the Northwest Territories and Yukon. Any and every province will be able to prevent the Northwest Territories and the Yukon from becoming provinces. This provision must be removed from the proposed amendment. It is unfair and inconsistent with the constitutional history of Canada.

2. The constitutional amendments of 1987 will also give all provinces a role in the extension of boundaries of existing provinces into the territories. The only governments which have no say in the process of changing territorial boundaries are the territorial governments which are directly affected. A change to territorial boundaries should be a matter for the Legislative Assembly of the Northwest Territories, the Parliament of Canada and the Legislature of the province or provinces directly affected.

3. We are extremely concerned about the new provisions in the constitutional amendments 1987 that will exclude the elected representatives of the two territories from the fundamental and obviously critical processes of executive federalism which have come to dominate political decision-making in this country. Elected representatives of the two territories must be invited to the annual constitutional conferences on the economy and on Senate reform and other matters. The people of the Northwest Territories

and their governments are obviously affected by these matters as much as any province.

4. The Constitution Act, 1867, would be amended to include new provisions related to the Supreme Court of Canada. Territorial governments have been given no role in nominating candidates for appointment to the Supreme Court of Canada, and there are doubts as to whether a resident of the territories would, in practice, ever be nominated by a province. The appointment of judges has been politicized. It has also become discriminatory.

5. Finally, some federal government sources have indicated that the provisions relating to the Senate might be interpreted unfavourably in the context of the Northwest Territories and the Yukon. It may be technically possible for the territories to nominate senators; however, it is far from clear as the proposal now stands. It must be clarified.

You as members of the Legislature of Ontario and we as members of the Northwest Territories Legislative Assembly have a lot in common. Like you, we were elected to represent the interests of our constituents, and like you we are concerned about the future of our communities, the territory in which we have raised our children and the country that all of us are part of. Like the elected representatives of this committee, we have been told that the elected representatives of the people of the Northwest Territories have nothing to offer where the constitutional future of Canada is concerned. Like you, we have been told that 11 men working through the night at the Langevin Block have created the perfect "seamless web" and that the imaginations and energies of the remaining 25 million Canadians could not possibly improve on their creation.

The elected representatives of the Northwest Territories have been told that the Meech Lake accord is only designed to meet Quebec's concerns and that we will have to wait until some second or third round. The people of our territory must wait until the first ministers have exhausted themselves in discussions about such things as fisheries. Discussions on fisheries are entrenched in the Constitution. The rights of the people of the Northwest Territories to participate in the political and economic life of this nation are not.

If the 1987 constitutional accord represents a new co-operative federalism, why is it that not even a single elected representative of the Northwest Territories was in attendance when these 11 men struck their deal at Meech Lake and the Langevin Block? Unlike you, we, the elected representatives of the Northwest Territories,

have to travel to Winnipeg, Toronto or Fredericton to plead for a hearing on issues which strike at the very heart of our rights as Canadian citizens. Can you possibly imagine our frustration with this process?

When it was reported in the press that the Premier told women, natives and northerners who opposed the Meech Lake accord that they must wait until it is ratified before Ontario would consider the complaints, did you think that was fair? When Mr. Peterson told you as a committee that you would not make any recommendations for amendments, did you wonder about our system of government in Canada? Did you have a sense that this country has put aside its parliamentary and democratic system to accommodate the dictates of 11 men? Are you no longer representatives of your constituents?

If Mr. Peterson had been told by nine other premiers that his attendance at Meech Lake was not welcome because they had determined that Canada could get by without Ontario, would you as residents of Ontario have felt that the rest of Canada had passed you by? If the proposed Constitution included a set of rules whereby Ontario's provincial boundaries could be encroached upon by another province without Ontario having any say in the matter, would you feel that was fair?

It has always been our impression that Canada is a country where opportunities may vary from province to province but fundamental rights of individuals do not. The residents of Ontario are probably confident that their votes are worth something, and whether they agree with the party in power or not there is someone speaking out for their province in federal-provincial relations.

The proposed constitutional amendment 1987 should embody principles and values that transcend petty, pork-barrel politicking. In the Northwest Territories, we are losing confidence in our future in Canada. The vested interests in Ottawa and the provinces are denying us the basic right to control our future or even to have a say in it. The 11 men who negotiated the Meech Lake deal sent a message to all Canadians. In our view, the message to you was different from the message to us. To you they said: "If you want to have some influence in matters that directly affect you, don't live in the Northwest Territories or the Yukon." To us they said: "Canada is complete. The north is a colony. If you want to join the party, leave the north behind."

Ladies and gentlemen of the committee, we are not prepared to accept that message, nor do we believe that you should be. We can only hope

that you have begun to see the bitter injustice that has resulted from the unbridled political pragmatism of the 11 first ministers who created the 1987 constitutional accord.

## 1020

Lest you think that we are ignoring the importance of bringing Quebec back into the constitutional family, we would simply like to state that the concerns we have do not affect Quebec's constitutional agenda. When Quebec's leaders refused to sign the federal-provincial agreement on November 5, 1981, they did so because the people of that province felt alienated and betrayed. Their assembly promptly enacted the override clause in section 33 of the charter to prevent the application of the charter to Quebec legislation. Quebec eventually presented a list of demands that had to be met if they were to rejoin the constitutional councils of the country. Since 1982, and even before 1982, Quebec's role in the federation has been a major preoccupation of federal-provincial politics. The 1987 constitutional accord meets their demands. The Northwest Territories and the Yukon have paid an unfair and disproportionate price in this deal.

We are not the only ones who perceive this constitutional accord to be a harsh denial of the rights of people in the two territories. Professor Schwartz of the University of Manitoba law school wrote this in his recently published analysis of the accord:

"It has been said that a society should be judged by how it treats the least of its members. Canadian politicians have just been exceptionally generous to one of the 'most' of its members. There is no need and no justice in asking the north to pay part of that price. Quebec is already 'in' confederation as a province with fully equal rights. The northern territories already face unprecedented barriers to joining the club. To get the 'in' even more 'in,' shall we make the 'out' ever more 'out'?"

"Some have argued that the Langevin Block text is a 'seamless' web. If one thread is pulled, the whole thing might unravel. Strangely, some of these same people were saying exactly the same thing about the Meech Lake text. Yet it was substantially improved at the Langevin Block meeting. If the 1987 constitutional accord is of such a fabric that the removal of one poisonous thread would leave it in tatters, then by all means we ought to pull it."

We would like to discuss this "poisonous thread" which in our view can be pulled out without leaving the fabric in tatters.



In order for you to understand our sense of betrayal and alienation, you should know something of the history of this issue. Let me begin in 1981.

While the entire country was hot with the possibility of patriating the Constitution, the governments of the Yukon and the Northwest Territories were frozen out of the process. Two issues emerged, however, which directly affected the Northwest Territories in profound and unique ways. The first was a clause in the constitutional package which would have recognized aboriginal rights. As you will recall, such a clause had been dropped from the constitutional package at the request of certain provinces.

The other issue related to a little-noticed provision in the amending formula that suddenly allowed most the provinces to become involved in the creation of new provinces and in the extension of the boundaries of the existing provinces into the territories. These latter provisions went virtually unnoticed by the public because, quite frankly, they were unaffected by them. The government of the Northwest Territories and the Yukon, however, were immediately concerned.

Prior to the appearance of these provisions in the amending formula, the government of the Northwest Territories had heard no talk of an expanding provincial role in these matters. The provisions took us completely by surprise. As any student of Canadian history knows, since 1867 Parliament alone has had the power to create new provinces.

These provisions which gave provinces a direct role in matters relating to the constitutional development of the Northwest Territories and the Yukon were all the more sinister by reason that they came as a complete surprise to the two territorial governments. In November 1981, the entire Legislative Assembly of the Northwest Territories travelled to Ottawa to demand a reinstatement of the aboriginal rights clause and deletion of clauses which gave provinces a role in the constitutional affairs of the two northern territories.

While the aboriginal rights clause was reinstated, the provinces would not permit the deletion of new powers in relation to the territories which had been given to them. That, however, was not the end of the matter. The new Constitution required a constitutional conference by April 17, 1983, to discuss the identification and definition of aboriginal rights. Section 37 of the Constitution further required that elected representatives of the territories be invited to the constitutional

conference if matters discussed directly affected them.

So we were invited. In fact, on the agenda of the first ministers' conference held on March 15 and 16, 1983, agreement had been reached among the participants to include an item relating to the repeal of those sections of the amending formula that allowed provincial participation in the creation of new provinces and the extension of boundaries of existing provinces into the territories.

Unfortunately, this was one of six major items that the first ministers were not able to deal with adequately at that conference, and so all first ministers, except Quebec's, together with the elected leaders of the Northwest Territories, the Yukon and the four aboriginal leaders, signed a constitutional accord on March 16, 1983. In it we agreed to return to this agenda item at one of three future constitutional conferences.

We never did come back to it, that is not until April 30, 1987, at Meech Lake. By that time, section 37.1 of the Constitution, which guaranteed that representatives of the government of the Northwest Territories and the Yukon would be invited to participate in these constitutional discussions, had expired and had been repealed by the operation of law. This expiry and repeal occurred only 12 days before the first ministers met at Meech Lake. Obviously, when we read the Meech Lake accord we felt betrayed.

The initial statements from the Prime Minister and the premiers after Meech Lake indicated that the provisions which had negative implications for the Northwest Territories and the Yukon were not intentional. Your Premier has said that we were mere casualties of the process. Senator Lowell Murray, on the other hand, advised the Senate and House of Commons committee in August 1987 that "at least some of the provinces were extremely jealous of the trappings of provincehood and opposed even giving the opportunity to territorial governments to nominate residents as senators, or qualified residents to fill a vacancy on the Supreme Court of Canada."

What conclusions can we draw from the process to date? In 1981, our protests were dismissed as unimportant. In 1983, we received in a constitutional accord a promise and an undertaking that the Prime Minister and the premiers would address our concerns about the new rules which gave provinces a direct role in the constitutional affairs of the Northwest Territories. Three first ministers' conferences came

and went and there were no discussions on this item.

Twelve days after our constitutional guarantee of participation in first ministers' conferences expired, the Prime Minister and premiers met in secret and dealt specifically with the matter relating to the creation of new provinces and an extension of provincial boundaries into the territories, among other things. On June 3, the Prime Minister and premiers agreed to a legal text which imposed harsh new requirements on the Northwest Territories and the Yukon. So whose idea was this? Which province or provinces decided that this should be part of the price tag for Quebec's return to the constitutional family? We do not know.

Can we conclude that the harsh treatment of the Northwest Territories and the Yukon was a mere oversight by the first ministers? Can we conclude that this ill-treatment was by design? We do not know for certain, but we believe it was. The stories emerging from those associated closely with the process are contradictory.

Mr. Richard is now going to address some of our concerns in more detail.

1030

**Mr. Richard:** Mr. Chairman, I want to add my thanks to that of Mr. Kakfwi to you and your committee for allowing us to appear before your committee; we are not residents of your province and you have considered us a special case in this instance. Although Mr. Kakfwi has indicated that we have travelled a long way, some 3,000 miles, to come here, we do come from a part of Canada that is as much a part of Canada as are Toronto or Kingston or Sudbury in your province.

We are representatives of a legislature. We do hope to convince you today of the merits of our case. As you recall, Meech Lake was April 30, 1987. Our legislature was in session in May and we passed a unanimous resolution declaring our opposition to it. We sent our government leader to the Langevin Block. He knocked on the door and was not allowed to attend the meeting. I thought that should be mentioned.

Last summer, when the government of Canada convened, very quickly and on short notice, public hearings in August, our legislature was dissolved at that time for an election, but we did send our Minister of Justice, who made a presentation on all of these points that we are making to you today. I hope that in your deliberations you will make reference to the report of the joint committee. There is a chapter on our northern issues. I want you to note that,

although that joint committee said, "Although these concerns are valid, we cannot reject the Meech Lake accord because of these northern issues." Even on that, that joint committee missed one of our points entirely, and for me the most important one. I will refer to that later.

The other hearing that we have had access to before today was the Senate task force on the Meech Lake constitutional accord and the Yukon and the Northwest Territories. It did travel north to Whitehorse, Yellowknife and Iqaluit and we understand its report is due in about two weeks' time. My sense of it is that we are going to get a sympathetic recommendation from the Senate task force.

As you can understand from what Mr. Kakfwi has stated already, our concerns are two in nature. One is with process. The 1983 accord that Mr. Kakfwi referred to in his submission we have included in the materials that we have provided to each one of you. I ask you when you have the time to look at that document and get a sense of our feeling of betrayal in this process that Mr. Kakfwi has outlined. It is in writing. The promise made to us to deal with these outstanding issues from 1982 was in writing. They were never dealt with. That promise expired on a date in early April 1987.

Then all of sudden these 11 people met on April 30 and dealt with, among other things, the issues that they had promised to discuss with us, and they did this in our absence. We see virtually bad faith in the dealings as they relate to us northerners. So we have a problem with the process.

We are also concerned about the text of the actual document that came out of the Langevin Block. I would like to refer to items in the order in which they appear in the actual 1987 constitutional accord. Section 2 of that document would add a new section to our Constitution of Canada, a new section 25, regarding the appointment of senators. Learned minds have in the last eight or 10 months given different interpretations of that section. At a minimum, it has to be clarified to ensure that we, as a Legislature and a government, have as much authority at least to suggest to the Prime Minister a list of possible Senate appointments. From the readings of the constitutional experts, either we do not have that right or at least it is uncertain. We want that clarified.

Section 3 of the 1987 constitutional accord would add new provisions allowing for immigration agreements between the provincial government and the federal government. We see no



reason why that opportunity should not be extended to the two territories. We are an unpopulated part of Canada. It perhaps should apply more to us than to the provinces. The immigration issue, I should say, is not one of our major points.

Section 6 of the 1987 constitutional document would add new provisions regarding appointments to the Supreme Court of Canada. One of the new provisions states that a judge or lawyer from the Northwest Territories or the Yukon may be eligible for appointment to the Supreme Court. However, the process of appointing must come from a provincial list. This is a problem for our resident judges and lawyers, because how are they going to get on a provincial list? Which Premier is going to realistically name a nonresident of his province on his list when he does get to make his recommendations to the Prime Minister?

You may think that because we are a small jurisdiction we do not have competent lawyers and judges, but I would like to point out, to put it in perspective, that on two occasions in the last decade a resident judge from the Northwest Territories—actually at a time when we had only one Supreme Court judge there—in 1978 and again in 1983, our one judge was taken from us for appointment to the Court of Appeal, in the one instance of the province of Alberta, and in the other instance of the province of Saskatchewan. We have had and still have competent lawyers and judges. This would disenfranchise them in terms of their aspirations to the Supreme Court of Canada.

There is a reference in a report of the Canadian Bar Association last year that was submitted to the Supreme Court of Canada for review. Recommendation 15 said: "The Supreme Court Act and any constitutional text"—including the one we are dealing with today—"ought to make clear that members of the bench and bar of the territories are eligible for appointment to the Supreme Court of Canada." That document was handed to the justices of the Supreme Court of Canada and they endorsed that recommendation with the phrase, "We agree."

Subsequently, the CBA passed the resolution which is set out on page 18 of our presentation, part of which says: "Be it resolved that the Canadian Bar Association urge the federal and provincial governments to immediately reconsider the process of selection of judges for appointment to the Supreme Court of Canada as provided in the Meech Lake accord and adopt forthwith the Canadian Bar Association recom-

mendations on the appointment of judges in Canada." So that is the issue on the Supreme Court appointments.

Section 8 of the 1987 constitutional document would add a new section 148 to our federal Constitution providing for an annual first ministers' conference on the economy and other matters. Such conferences clearly affect our government and our citizens. On that issue, we urge that the text be amended to ensure that elected representatives from the territories are invited to participate in these meetings.

Let me put that in context for you. We now have an annual budget, as you will see from one of the other glossy documents we have provided, of a magnitude of \$800 million. We far exceed the budget of Prince Edward Island. However, 74 per cent of our revenues come from the government of Canada. We have to develop our own economy. Therefore we should be participating in these national conferences on the economy.

The next point is for me the most important point of all, dealing with the extension of boundaries into the territories. Section 9 of the 1987 constitutional amendment document changes the amending formula in the Constitution of Canada. On the issue of provinces extending their boundaries into the territories, it would now require unanimous consent of all the provinces, the Senate and the House of Commons to do that. It is silent on whether you consult or get the consent of the elected representatives of the territory you are encroaching upon. Quite frankly, to me, it is appalling that the first ministers would put that in the constitutional document in 1987 and 1988. Clearly any changes to our boundaries must only happen with our consent.

#### 1040

Perhaps I can remind those of you who have read the Constitution of Canada that there is a section of the Constitution of Canada, section 43, that deals with a boundary between two provinces changing. Let me not mention Ontario. Let us say Alberta and Saskatchewan. You all know the area of Lloydminster. Let us say those two provinces, for whatever reason, want to change the boundary slightly east or west. Section 43 of the Constitution of Canada says how that is achieved. It says it will be achieved by a resolution passed by the legislatures of those two provinces and the Parliament of Canada. It is only logical that is what should happen. Why should New Brunswick or British Columbia or Ontario be involved in it?

We say if the province of Alberta wants to move its boundary north to the Beaufort Sea and take our territory, at a minimum we have to be consulted and agree to it. It is bad enough that the formula they are proposing would bring New Brunswick and BC into that discussion, but the most appalling part is that we are not in the formula.

Let me put it in a context involving Ontario. Prior to 1912, part of your province was part of the Northwest Territories. I was not around then—I do not think anyone in the room was around then—but someone in Ontario, in his wisdom, sought that territory and obtained it. But those discussions were between this province, as it then was, and the Parliament of Canada. New Brunswick did not have a say in whether northern Ontario should be part of the province of Ontario; nor did British Columbia. That is the history of that issue.

This issue, I must say, has not got the attention it deserves. We have been screaming since last April 30 about the Meech Lake accord. Whether it is the politicians who have been speaking or the media which have been covering it, it is the new-provinces issue. The creation of new provinces is the one that gets all the attention. To me, this issue is more important. Even in the report of the federal joint committee I referred to, if you can believe it this issue, as important as it is—and there is an entire chapter on northern issues in the joint committee's report—but this issue is not even mentioned. It is in the presentation that our Minister of Justice made. It is in the presentation that the Yukon government made. But there is not one mention of it in the joint committee's report.

I hope that your committee will see fit to address this issue. Although we feel very strongly about new provinces, realistically let us pick a date 30 or 40 years down the road; but this issue is five or 10 years down the road. If Bourassa wants James Bay, is he going to wait until after we are a province or is he going to move on that now? I say that is more important, more immediate and more appalling than these other issues.

Let me move on to the new provinces issue at the bottom of page 19 of our brief. The 1987 constitutional accord would, again in section 9, change the amending formula, and in the list of items that the amending formula applies to is a requirement for unanimous consent of the provinces, the Senate and the House of Commons to establish new provinces. It provides that only the provinces or the Senate or House of

Commons can initiate the establishment of a new province.

This process is repugnant to those of us Canadians who live in the Northwest Territories. The establishment of new provinces should be a matter left to Parliament and the affected territory alone, which has been the case throughout Canadian history.

We are disappointed that people like Getty and Devine would agree to this. We say, "How soon they forget." The year 1905 is not that long ago. The provinces of Alberta and Saskatchewan were created out of the Northwest Territories by the people then living in those parts of the Northwest Territories, and they dealt with Ottawa alone; they did not have to get the consent of New Brunswick or Ontario. Yet now, in 1988, they say that it is not an issue between residents of the Northwest Territories and Ottawa; it involves and it will require the consent of every one of the provinces.

Finally on our list of grievances with the 1987 constitutional document, section 13 adds a provision for constitutionally entrenching first ministers' conferences. At least once each year, starting this year, 1988, there is to be a first ministers' conference. We are urging that this provision, section 50, be amended to ensure that elected representatives from the Northwest Territories and the Yukon Territory be invited to participate in those meetings.

If the constitutional status of the Northwest Territories or some matter which directly affects the territories were to be discussed at the conference, there is nothing in this section 13 that would prevent the first ministers from again bargaining away the rights of northern residents in a secretive process that excludes our elected leaders. So we ask that this be changed lest Meech Lake be repeated.

We are not conceding that other matters in the accord do not affect the Northwest Territories. We particularly identify with the women and the aboriginal peoples of Canada who have been told to wait in line at future conferences behind Senate reform and fisheries. The aboriginal peoples of Canada certainly constitute "distinct societies." Their rights have been recognized and affirmed by section 35 of the Constitution, yet the Yukon and Northwest Territories continue to be treated like colonies and the people of the territories as second-class citizens.

The Meech Lake deal gives the provincial governments more power over the constitutional future of the two territories than has been afforded to the territorial governments. The



economic future of Canada certainly involves us. The people living in the territories are directly affected by free trade, by spending power and by resource development, but the governments of the territories will not be invited to economic conferences under this apparently renewed "co-operative federalism."

I hope, Mr. Chairman, that we have made our point on these issues. We came here today to your province to try to convince you that we have legitimate concerns and that the time to deal with them is now, at this stage of the process, not at some future date when these offending provisions have become part of the supreme law of this country.

We have had a great deal of sympathy, as I have indicated, from some politicians and senators when we have raised these issues, but we need action and not sympathy. We need representatives, MLAs like yourselves, colleagues of ours in the profession, to take courageous steps to bring the Yukon and Northwest Territories within the vision of southern Canadians. We are asking you to rise above the confines of party discipline to test the values and principles upon which this country has been founded.

The text of the 1987 constitutional document did not receive adequate reflection or consultation before the first ministers committed themselves and their governments to it. The items we have discussed today certainly were never identified by Quebec as being part of its demands or its constitutional agenda. Our recommendations, if you agree with them and if they are implemented, would in no way affect Quebec's constitutional agenda. Again, Professor Schwartz, in his recent book, has pointed out:

"One province has no direct authority over the people of any other province. True, a new province does have a vote over constitutional amendments. But an extra vote, no matter how 'hostile,' creates no real risk of imposition on an existing province. The latter can, according to other aspects of the 1987 accord, 'opt out' with compensation from any amendment that diminishes its authority; and it can veto any changes to federal institutions. Even under the existing amending formulae, the addition of a new partner in Confederation poses essentially no 'risk' to the existing authority and rights of any provincial government, let alone that of Quebec."

#### 1050

We urge your committee, Mr. Chairman, to recommend amendments to the Meech Lake accord. There is certainly precedent for doing so.

The federal-provincial agreement of November 1981 was changed in four respects before it became the Constitution Act, 1982; so it was done before. In fact, at the last round, between the 1982 first ministers' document and the actual law there were changes made. The removal of the sex equality clause from the override clause was one of them. The native rights clause—and my colleague Mr. Kakfwi was part of that lobby process at the time—and two other issues were changed in the time frame that we are now in.

We want to remind members of your committee that it would subvert, in our view, the fundamental principles of our democratic system if you were not able to amend the accord. To conclude otherwise would, in the words of Senator Forsey when he spoke to the joint committee in Ottawa last August, "establish a new, supreme, sovereign, omniscient, inerrant, infallible power before which the function of Parliament and the legislatures would be simply to say *roma locuta est*: the first ministers have spoken, let all the earth keep silence before them."

I myself am an MLA, as you people are. I would have to think hard about that kind of statement if I were sitting in one of your chairs. Where do my responsibilities lie? The Meech Lake accord was struck because Quebec had been promised a fair deal when it decided to choose Canada over independence. We are not here to diminish Quebec's role in Canada, nor do we wish to minimize the promises that were made and broken in relation to Quebec over the years. At the same time we cannot ignore, and we are asking that you not ignore, the promises made to the people of the Northwest Territories as they have struggled to participate in the political and economic life of this country.

In 1966 a couple of distinguished Canadians—John Parker, who is our present commissioner, and Professor Beetz, who is now on the Supreme Court of Canada—were addressing Inuit people on Baffin Island and explaining to them what it meant for them to be citizens of Canada. I hope at the time there was an interpreter available for the Inuit people. This was some 20 years ago.

"In larger towns and in larger cities in other parts of Canada it is important to have organizations or organized government in order that people can live within certain laws and know the way that they are going....

"In the higher echelon of government we find elected persons whom we elect.... That is why you and I are free people. We are not the ones who take orders or who are servants; we are the

ones that give orders by voting for somebody...."

With that kind of message, the government of the Northwest Territories moved from Ottawa to the now capital city of Yellowknife in 1967. We have made tremendous, gigantic steps since that time towards our eventual goal of responsible government.

I should tell you that from 1905, when the two provinces were created out of our territories, we did not have elected representation for 70 years. It was only a short time ago—1975—that we had a fully elected Legislature. For many years it was all appointed bureaucrats and just prior to 1975 it was a mixture of appointed people and elected representatives.

It is only three or four years ago that we now have only elected people as ministers of our government. So we have moved rapidly, building government in the Northwest Territories on the principle that was explained to the Inuit people in 1966 in the quote that is referred to. However, we are now faced with "jealous" provincial governments making secret deals to prevent us from becoming a province.

The provinces, with the acquiescence of the Prime Minister of the country, have also given themselves powers to displace our legislatures and democratic institutions. Those powers may allow provincial boundaries to be extended into the territories without consulting or obtaining the consent of territorial legislatures. This, of course, is unacceptable to us.

Members of the committee might think this is pie in the sky. This extension of the provinces into the territories is not being considered by any of the existing provinces. We remind you that at least one Premier, Premier Strom of Alberta, made this suggestion at a constitutional conference in 1969. Personally, I am convinced that British Columbia, Alberta and Quebec, of the present administrations, do have their eyes on our northern territories.

As recently as November 1986, we have a newspaper clipping on file from one of Canada's major papers quoting a Quebec bureaucrat speaking on behalf of his government. He was reacting to the then news, and I think you have all heard it, in the north one of the big political issues in the Northwest Territories recently is the possibility of our dividing into two territories.

In reaction to that, this official stated at a conference: "Hudson Bay and James Bay should be divided up before there is a big battle over potential oil and gas resources there. Only an agreement between Ottawa, Quebec, Ontario and Manitoba on the bays can avoid a crisis...."

Both bodies of water and the islands in them are now part of the Northwest Territories. This extension of natural provincial boundaries should be done before the division of the Northwest Territories takes place."

The official is further quoted as saying, "It is easy to foresee all sorts of political and social difficulties if one day Quebec, Manitoba and Ontario have to go to Frobisher Bay, the capital, maybe, of this new province, and beg for the resources that are there in Hudson Bay and James Bay."

I say, why not? What arrogance for that official to say that.

Perhaps, Mr. Chairman, you can now begin to appreciate our concerns with the Meech Lake accord. Since 1905 we have been advancing towards provincial status. We now find our way barred by a deal made by first ministers in a secretive and exhaustive process. Senator Murray told the special joint committee last August, "At least some of the provinces are extremely jealous of the 'trappings of provincehood,' and oppose even giving the opportunity to territorial governments to nominate residents as senators or qualified residents to fill a vacancy on the Supreme Court of Canada."

We hope your committee will give consideration to our recommendations for amendments at this stage of the process and that you will take the courageous step of recommending these amendments to your Legislature.

To conclude, I would like to read excerpts from a speech made by the Honourable Pat Carney in the House of Commons in November 1981, over six years ago. Ms. Carney is a former resident of the Northwest Territories. She was speaking at that time to an amendment proposed by the then Conservative opposition, supported by the New Democratic Party federally. The amendment called for the deletion from the amending formula then proposed of those sections which gave provinces a role in the establishment of new provinces and in the extension of provincial boundaries into the territories.

The Tory party's amendment was defeated by the then Liberal government. The roles have changed in six years. Mr. Turner's party, federally, did attempt an amendment including our concerns last year but it was defeated in the federal House.

#### 1100

But look at what Ms. Carney said over six years ago on these very issues: "Mr. Speaker, we are debating an amendment which would remove



an insulting and degrading inequity in the resolution before this House, which seeks to provide us with a made-in-Canada Constitution. That inequity is inherent in the provisions of the amending formula for the proposed Constitution which would allow the extension of existing provinces into the two northern territories without their consent.

"It is degrading because it would enshrine in the Constitution of our country the revolting concept of a perpetual colonial status in the north. It is insulting because it would entrench in the Constitution the repugnant idea that there could be two different classes of Canadians with different political rights, depending on whether they live in Canada north or Canada south.

"These two offensive clauses represent the threat of a possible grab by some of the provinces for northern resources which more properly belong to the northerners and to Canadians as a whole. If retained in our Constitution, they virtually eliminate any hope that the two northern territories could evolve as a province, as did the rest of the country.

"Thus, this resolution in its present form is offensive, it is repugnant and it is also ludicrous. The resolution suggests that one Prime Minister and nine southern premiers could carve up the north in their so-evident self-interest. It would create a Constitution drafted by southern Canadians which gives them rights denied to northern Canadians.

"I hope the Premier of my province"—she was referring to the then Premier Bill Bennett—"can see the unfairness of this resolution. Imagine the anger and the fury and the rage of those Canadians who live north of 60, who by an act of this Parliament would be condemned to perpetual serfdom and to perpetual colonial status unless these offensive clauses are withdrawn.

"I can relate to this anger because I experienced it while I was a resident of the Northwest Territories. I can relate to it because it is an anger similar to that felt in the west when the provisions of the original resolution laid before the House would have created different classes of provinces.

"We are talking about Canadians. If members of this House are prepared to declare that these Canadians are to be enshrined as second-class citizens under our Constitution, we should be ashamed of ourselves."

She went on to state, regarding the problem of not amending the thing midstream: "I would suggest that if we sell out the north, we would sell out our self-respect as Canadians. We should

never be a party to a document which would permit the extension of the provinces into the Yukon or the Northwest Territories without territorial consent.

"Some may argue that amending the resolution at this stage might threaten the spirit of the accord reached by the Prime Minister and the premiers." How recently have we heard that? Talk about déjà vu. "We can only ask ourselves why the Prime Minister and the nine provincial premiers would feel that discriminatory measures which were unacceptable to them would be acceptable to people in the north."

"If we pass a resolution which gives certain rights to some Canadians and denies them to others, then we will have destroyed the very foundation of this Parliament, this federal institution of a country which stretches from sea to sea to northern sea. If we pass this resolution unamended as an act of Parliament, it will be an act of contempt towards Canadians north of 60.

"I urge you," she stated, "to right this wrong, remove this self-serving insult and ensure our self-respect as Canadians. I implore you to support our position that these degrading clauses must be removed."

Mr. Kakfwi and I and the other 22 MLAs we represent back in Yellowknife are relying on your help. We ask that you not accept that no changes can or should be made. This is not just another bill that you, as legislators, deal with. This is the Constitution of Canada.

You have already indicated to us your sense of fair play by the fact that you have allowed us to come and participate in what is basically a provincial public hearing.

In conclusion, I want to tell you on this issue, and trying to set aside my own bias, what I as a Canadian citizen see from a distance. I see we are living in a part of Canada that is being virtually totally ignored by the 11 first ministers. Ironically, this is at a time when the government of Canada is prepared to give the United States of America free access to northern Canada to test cruise missiles and other military aircraft, and it is also ironic that it is happening at a time when the government of Canada is telling the world that Canada has sovereignty over the Arctic waters, and yet we Canadians living there are being totally ignored by these 11 first ministers.

What I see from a distance is political expediency and I also see, quite frankly, weak southern Canadian politicians who are afraid to stand up to the one or two first ministers who, in my personal view, simply want to march or

parade this accord, uninterrupted and very quickly, into the Canadian history books.

I hope the people in this room are not weak but are strong politicians and will give us some assistance in this matter.

**Mr. Chairman:** Thank you both very much for what was a very frank and full presentation. There certainly were a number of items in it that I must admit I had not heard discussed and was not fully aware of. I think those points and issues will be of great help to us.

We have felt within this committee that as a select committee of the Ontario Legislature it is to that Legislature that we make our report, and critical to that is a process in which we try to listen to as many individuals and groups as we can. Only at the conclusion of those hearings and after discussion among ourselves will we be in a position to make our report. I think many things are said by many people in other places. What we are trying to do, as a committee, is to listen as openly and honestly to you and to others, and at the end of that process I hope very much we will bring forward a report which will try to meet as many of the needs as we have heard and feel that we can incorporate.

It is important that you bring forward your proposed amendments, suggestions and so on because we need those in terms of ultimately developing our report. So we are most grateful for that and I have a number of questioners.

**Mr. Offer:** I would like to thank you for your presentation. Obviously you have touched on some very important matters.

**Mr. Richard,** I would like to deal with, as you indicated in your opinion, what are the most important concerns which you have, and that is, if I hear correctly, first, the creation of a new province and second, the incursion of existing provinces into the territories.

I see, as you were speaking on page 4 in your article 2, you addressed that issue and provide some background information on page 25 with respect to certain articles which have been written.

I imagine you have heard the comment that the mere fact that there is now unanimity required will provide a greater security to the territories with respect to the incursion of existing provinces into the territories. The mere fact that unanimity is now required for that matter will now provide that type of "security." I use the word "security" but that is probably not the correct word.

What I would like to do is get some comment from you on that issue. After that, I would like to

go into the creation of a new province, but on the point of incursion of existing provinces into the territories, the mere fact that there is now a unanimity proposed does provide a protection for the territories which was not in existence before.

**1110**

**Mr. Richard:** On that argument, because I have heard it before, the first point is that the suggestion is being made that going from the 1982 formula to the 1987 formula is better for the north because instead of only seven provinces agreeing to an extension into the territories you now need 10. That presupposes that the 1982 formula is a good one. It is not. It is as appalling as the 1987 formula. We fought it in 1981. That is the first point. The 1982 existing formula is a bad one on this issue.

The second response to your query is that our position on clause 42(1)(e), the extension of boundaries, is not how many provinces should agree, it is that we should agree. If I could cut a deal today, I would say, "All right, leave the 10 provinces in there, if you will just add us, as a vote." In a perfect world we may say to Alberta, "Sure, you can take over our territory right up to the Beaufort Sea, but only if we agree."

The issue is not how many provinces are in the formula; the issue is that we have to be in the formula, on the extension of boundaries.

Finally, I guess my response to you is that I do not feel secure at all. We have seen the back-scratching that happened at Meech Lake. Who would have predicted before then that Prince Edward Island or Manitoba would get a veto over constitutional changes in this country? These guys behind closed doors will give to each other, and if Don Getty or Premier Bourassa wants part of the northern territories, I believe that he can get the other nine votes because he will cut a deal with them. My fear is that we will not be there to call a halt to it.

I do not feel with this change from the 1982 formula to the 1987 formula that we are any more secure at all, for those reasons. I do not know if I have answered your question.

**Mr. Offer:** If I might just continue with respect to the creation of a province, you have said, again on page 4, that provinces must be directly affected. I hope I am not reading it wrong. It says, "A change to territorial boundaries should be a matter for the Legislative Assembly of the Northwest Territories, the Parliament of Canada and the Legislature of the province or provinces directly affected." I would expect that applies to the creation of provinces also.



**Mr. Richard:** That paragraph 2 that you are referring to on page 4 deals only with the extension-of-boundaries issue, and the province affected would be, say, Alberta. If it wanted to come north, we are saying that it is an issue only among the Northwest Territories, Alberta and the federal government.

**Mr. Offer:** OK. So it does not deal with the creation of a province.

**Mr. Richard:** No; the next paragraph does.

**Mr. Offer:** Okay. Thank you very much.

**Mr. Breaugh:** I wanted to kind of clarify, at least for me and, I think, most members of the committee. You are not here at our whim or anything like that. We sought you out. We felt it was important that we get your perspective on this agreement and that you bring to our deliberations some understanding of what this deal looks like from a very different situation in Canada. So I hope you think you are here as our peers, our equals, our fellow Canadians and as legislators who have got the same kind of dirty work to do, which is to look at this accord after the fact and decide whether it is for real or not. I really think if the sense is that part of the people of Canada are betrayed in order to put together a package, it really cannot be much of a package.

It seems to me that a lot of what is in the accord that would be worrisome from your perspective is not actually what is written down there but what is not written down there. It also seems to me that part of what you had to say this morning is that it speaks to the intentions of the people who put together this agreement.

Now, these may be 11 wise people or 11 fools behind closed doors. Who knows what they are? But it does seem to me, having been in politics for a while, that if I made a mistake, if I wrote something down on pieces of paper and I had now almost the better part of a year to say, "Well, that is not what we meant; your rights aren't threatened," I would want as a practising politician to go or send my staff people out to clarify the situation.

I would assume that if your rights are not threatened under this, you must have been inundated in the last year with people from the federal government of Canada trying to convince you that your rights are not impeded, you are not threatened; here is how you are included; you will be invited to the first ministers' conferences. In almost all of those concerns that you have expressed to us this morning, it seems to me there was an obligation on the part of the federal government, probably as the person who would take the final responsibility for this, to assure you

that none of these things are true. Have they done that?

**Mr. Richard:** No, they have not. We as a Legislature, as I mentioned, passed a resolution unanimously last May—in other words, after Meech Lake and before Langevin Block—and sent copies of it to everyone from the Prime Minister of Canada on down to the provincial premiers. We have not got any assurances that it will be dealt with. Well, they said they would not disturb the current accord; I mean, they answered it that way. They would not let our then Government Leader and the Government Leader of the Yukon attend the Langevin Block agreement.

If my memory serves me correctly, there were changes made. The text was improved from Meech Lake to Langevin Block. I recall that one of the last sections, section 16, did some clarification. Some of our points are just that, Mr. Breaugh; clarification only is what we were asking for. But they would not make any changes for us before Langevin Block and would not let us go to the meeting.

But to answer your question, no, we have not got those kinds of reassurances from them.

**Mr. Breaugh:** Let me pursue that just for a second because I think this is important. I find that really strange. As somebody who has been in politics for a while, I know that when somebody points out a problem in a law that has been passed, we, as a general rule of thumb, try to figure out, is their concern valid? If it is, we try to address that; if it is not, we at least have the courtesy of going to them and saying: "Well, I think you have misread this a bit. I think there is something in your understanding of the bill that is not correct." It seems to me there should have been a lot of activity, on the part of the federal government at least, and probably all of the provinces, to listen to what you had to say and then to address your concerns. If all you really need is clarification, surely someone should have been able to give you that.

**1120**

**Mr. Richard:** Sorry, it has not happened. On just the one point, on the Supreme Court of Canada appointments, if you look in the report of the joint committee, they use the words—these are the senators and the parliamentarians—"We see no justification for this having happened." They use words like that, yet they will not recommend a change. They are that convinced that we are right.

As Mr. Kakfwi referred to in part of his presentation, the problem we have is that we are

getting two messages. We are getting a message from some people: "It was just an accident. We just forgot about you guys." Your Premier (Mr. Peterson) has told one of our leaders that we were a casualty. That is his word.

**Mr. Breagh:** Can I ask you one final question? A number of us have been trying to sort out what you could do. If amendments do not carry, what other things could you do? We talked a fair amount about making a reference to the court to see whether we could get these clarifications and do something that way, but in part it goes back to something that I think both of you said, and I would appreciate a fairly frank judgement call on this. Do you believe it was the intention of these people to word an agreement in such a way that it actually did take away rights from some Canadians?

There were changes made between the original agreement and the finalized version, and I have heard comments made that, "Well, we did not mean to do that." I just find it difficult to believe that 11 of the most prominent politicians in the country, not very many of whom were new to the process, with all of their staffs, all of their listeners and advisers and all of that, could really make errors of that kind. It really kind of goes to the judgement, because obviously if what we need here is clarification, if they did not intend to do it and we could clarify that, that is one set of conditions. If it was their intention actually to exclude people from this agreement, to remove some rights, then that is not going to be rectified by some clarification even probably by a court.

**Hon. Mr. Kakfwi:** In my view, I think that some of the provinces—as we pointed out, Quebec, probably British Columbia and Alberta as well—have some very real interest in seeing their borders run north to the Arctic. I would think that provinces like New Brunswick, Nova Scotia and Prince Edward Island do not really have those types of aspirations. So with some, I would think it is a very direct vested interest in getting that supported and, for some, a nonissue. If it means it is going to carry the day that they agree, I think they have done that.

My feeling about it is that it depends on what your view of the north is, how offensive you may think the residents of the north would find such an accord. I would think historically, because the provinces were created only when the population became predominantly non-native, that it would probably apply in this case as well that if the premiers of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland felt—and a line which we use very much is that the

majority of the people of the Northwest Territories and the long-term residents are native people. Historically in Canadian history we as native people have been treated very much as second-, third-, fourth- or fifth-class Canadians, if at all. The rights that all Canadians enjoy, we received only very recently. That would perhaps dull their interest in ensuring that the residents, whoever they perceive the residents of the Northwest Territories to be, are accorded the same rights that other Canadians expect and do get. That is my suspicion and my view.

If the population of the Northwest Territories was overwhelmingly non-native, there might have been a chance, perhaps a greater degree of interest on the part of the premiers and their advisers, to ensure that nothing in the accords that crop up from time to time threatens or takes away rights that these residents should enjoy. I guess that is basically my view of it. It depends on what the perceptions of the north are. It is my suspicion, I guess, that aside from the relatively small population and the remoteness, is the fact that we are still—and I say "still" because it is quickly changing—a slight majority in the Northwest Territories who are still native people.

**Mr. Chairman:** Mr. Kakfwi, just as a follow-up on that one, have you or has the government of the Northwest Territories spoken directly with the Quebec government, for example, on these issues? Do you have any sense of a possible opening there? As you both have noted, one of the problems that any legislative body right now has in dealing with this is that one is constantly told of the web, the fabric, whatever, and if you pull one thread, everything is going to unravel. Have there been any discussions, do you have any sense of what they might be prepared to look at, or is it simply that there is just no discussion on this?

**Hon. Mr. Kakfwi:** Our government leader met with the Premier of Quebec, Robert Bourassa, a couple of weeks ago and brought up our concerns. As I understand it, there was a very flat, definite, emphatic no to dealing with our proposed amendments. They will have to wait until some other time in the future.

**Mr. Chairman:** Was there any sense that these were valid suggestions or proposals and that there was an opening there for future change? Or was there a feeling that not only was it no at this point but also they really did not want to consider it?

**Hon. Mr. Kakfwi:** As I understand it, the Premier indicated that the concerns would be dealt with in the next round or the round after the



discussions of the premiers, but not at this time within this accord.

**Mr. Allen:** Let me echo, first of all, one or two remarks that have been made in welcoming you here. This committee is not the Premier's committee; it is the committee of the Legislature of Ontario. We do not consider ourselves, at least my colleague and I certainly do not, to be here to represent whatever the politics of grandeur of Ontario or any other province may have dictated with respect to the conduct of Meech Lake or the Langevin Block discussions.

It is our concern to try to ferret out as best we can the meaning of what happened, to understand the problems that were inherent in both the process and the substance, and to try to respond to those problems. Personally, I am delighted that you are here, that you are helping us with this new task that legislative committees now may well be saddled with in the future of looking at national issues and constitutional controversies and therefore having to draw on national representation to legislative committees like this. You are helping us very much with that process.

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I want to ask you, just so I have a sense of the status of your participation in constitutional discussions in Canada at this present time, I have looked through what you have supplied—and I have seen this before but not to have read it carefully—and my perusal of it does not tell me that there is a specific time limit on this. Correct me if I am wrong.

I do see under the second series, section 5, a reference to the fact that you and the territorial representatives from the Northwest Territories aboriginal peoples are to be involved in annual discussions that will be convened by the federal government to consider constitutional matters. Yet you did say in your brief when the time period ran out on these discussions—was there an understood and clear time period that that accord applied to? Is everything in that accord therefore wiped out, both procedurally and substantially, as of some time in the spring of 1986, or does this accord still hold and are you understood constitutionally still to be in process, so to speak, with the federal government in constitutional matters?

**Mr. Richard:** I did not participate in the March 1983 accord, but my sense of it is that the document has expired, certainly legally and contractually but also politically. You will recall on the issue of aboriginal rights that the premiers threw up their hands and gave up in March 1983.

Although others can articulate the case of the aboriginal peoples much better than I, think

about the sense of frustration that the aboriginal peoples had when they went to that last conference of March 1983. We all saw a lot of it on television. They virtually gave up, saying: "We can't. We are not going to try any more." They learned three weeks later that 11 of them had managed to amend the Constitution of our country, virtually overnight; yet they could not deal with the aboriginal rights and never even got to our agenda items over—what?—three years of conferences.

My understanding of it is that the document has expired. There is not a commitment, and if this resolution passes all the legislatures, we have to start from scratch again to get on these agendas. They are entrenching these new things called FMCs, first ministers' conferences, in our Constitution. Are we going to even be invited? The Constitution says we are not.

**Mr. Allen:** Have any of the premiers responded in any particular way to the request that you at least be listed in the schedule of the agendas for forthcoming constitutional discussions?

**Mr. Kakfwi,** you referred to the discussions with Premier Bourassa. Was he prepared to make any commitment at all that it would be possible to place the concerns of the Northwest Territories and other aggrieved groups on the agenda, but particularly your concern about forthcoming conferences? If not, why would there be a problem in his eyes in amending that very small part of the Meech Lake accord? Do you have any sense of where he was at on that question? That is one possible amendment we could certainly put forward from this committee, for example.

**Hon. Mr. Kakfwi:** There is an illusion created that our concerns will be taken care of in future constitutional discussions, but there is nothing on paper or by letter that says that. There is certainly nothing from the Prime Minister, who generally convenes and presides over these conferences.

As we said earlier, we have no problem with Quebec being more "in" because it has been rather "out" of its own choosing, I guess, and because of poor politicking perhaps in recent years, but we do not think the price should be that we should be more "out" in order to make Quebec more "in." The fact is that in recent history, since repatriation or the exercise to bring the Constitution back to Canada started, we have been progressively more "out" every year and now we are just about completely "out." There is nothing that assures us that our views will be heard.

As Mr. Richard has said, the immediate concern and the biggest concern we have is the extension of boundaries. Whatever formula we have for the creation of new provinces is perhaps years down the road, but the immediate threat is that we may never get to exercise those options if the provinces convene, say next year, and decide to divvy us up among themselves. That is the biggest problem we have and, of course, having no say, wanting to be part of that formula and wanting and requiring to protect our rights as Canadians and as a political entity to be part of the constitutional conferences in the future.

**Mr. Cordiano:** Could I have a supplementary to that? I just want to explore very briefly with respect to the first ministers' conference. Both the Northwest Territories and the Yukon were present at the last first ministers' conference held here in Toronto, at which time both territories were given the opportunity to speak at the first ministers' conference. I was just wondering if you could point out for us the way in which that has come about with the federal government. Obviously, it is not entrenched anywhere, but is there an arrangement that has been made over the years or recently? Could you just give us a little bit of background on that?

**Mr. Richard:** Mr. Chairman, we have with us Bernie Funston, who is a staff constitutional lawyer with our government. I wonder if he could explain the status of those very brief, four-minute appearances we are allowed to make at those conferences.

**Mr. Chairman:** Sure.

**Mr. Funston:** Very briefly, it could be described, I suppose, as a conventional arrangement. There are letters between the Prime Minister of Canada and the elected representatives of the Northwest Territories which set out some concessions. The nature of the concession is generally that we would go to such conferences as observers—the first ministers' conferences on the economy, for example—and that we would not participate these days as a member of the federal team, although initially—five years ago, for instance—we were there as a member of the federal team. We go now as an interested party, but we get a little section of time in the federal time to speak.

I might just mention that in 1984 the federal government issued guidelines to its own departments respecting both territorial governments, and I will quote from those guidelines. They say:

"Over the last 15 years, an important evolution has taken place in the arrangements under which the governments of the Northwest Territories and

the Yukon are represented at federal-provincial conferences and meetings of ministers and officials. Previously, the territories took part on relatively rare occasions. When they were invited, they were normally represented by federal civil servants or by federally appointed officials from the territories who were made part of the federal delegation.

"The situation is now quite different. The broadening of territorial democratic institutions and the strengthening of public service in the north have given the territorial governments a new capacity to play a more effective role in intergovernment conferences and meetings. For federal-provincial conferences of ministers, it has now become the practice to extend invitations to territorial representatives at the political level."

At the first ministers' level, obviously, where matters directly affect the two territories, they have been given an occasion to speak. From 1982 until the spring of 1987, that was in fact embodied in section 37 of the Constitution, the main conferences, of course, being on aboriginal rights.

**Mr. Cordiano:** With the entrenchment of first ministers' conferences in the Constitution yearly, I would say you would have a lot of those opportunities to bring matters up on an ongoing basis. We have heard from various people in terms of whether that is a very viable thing and how often we are going to meet on our own Constitution. If it is an annual thing, then obviously it presents a real difficulty for us if we are constantly going back to our Constitution to revise it.

We obviously have a number of areas to look at, and I would say that is one of the things that this committee is grappling with: how to formulate a process by which we can oversee and monitor that annual conference and what role legislatures are to play in that. But certainly there is an opportunity for an enhanced role for everyone.

**Mr. Richard:** On that issue, it should be pointed out that we have regressed from 1982 to 1987. The 1982 document did call for future conferences, but they were sunsetted. Even in that document there was a requirement for the Prime Minister to invite our representatives if they were going to discuss matters that directly affected us. So you leave it up to the Prime Minister to decide. We do not even have that in this 1987 document. In that sense it is a step backwards.



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**Mr. Allen:** I have another supplementary.  
Interjection.

**Mr. Allen:** The web gets rather tangled from time to time.

I wanted to follow up the question of my colleague Mr. Breagh with respect to contacts between the territories and the federal government by asking whether our own government, after the first Meech Lake discussion learned of the problems that the territories and other groups were having, made any contact with the territories or territorial representatives, to the best of your knowledge, in order to sound out directly what the nature of those concerns were and how they might be redressed. Were there such contacts between the Meech Lake and Langevin discussions?

**Mr. Richard:** My recollection is that our legislature, through our Speaker, communicated the thrust of our motion in the assembly prior to June 3, prior to Langevin Block. Our then Government Leader, Mr. Sibbeston, communicated by telex and means like that to the Prime Minister and the 10 premiers. There was no response at all prior to June 3. Our phone calls were just not returned. They went into the June 3 Langevin Block meetings without ever speaking to our people.

**Mr. Allen:** I find that quite astonishing because it was quite obvious that, for example, the Premier of this province was prepared to shift ground considerably in some respects, especially in attitude, between the Meech Lake discussions and the Langevin discussions. If one talked, for example, with the aides and assistants who were there for the province of Quebec, one learned that they discovered in the first round that the Premier of Ontario was very forthcoming and friendly towards the Quebec delegation and the second time around was almost hostile. In between, some groups had got to him and he was reflecting some nervousness about where the Meech Lake discussion had got to in itself in the earlier round, which leads me to be rather concerned, since he had become aware of your concerns and apparently had not been prepared to give voice to them as he had to some others.

With respect to the clause that was used to include some other groups, namely, the multicultural groups and the aboriginal community in a formal way, clause 16, do you view that as a meaningful gesture even on its own ground, and could it have included you specifically in some helpful way?

**Mr. Richard:** I would answer that in view of the time it took and the magnitude of the problem to draft section 16 to accommodate those other groups, it would not have taken any more time or trouble to accommodate at least some of our concerns. I still view the Senate one and the Supreme Court of Canada one as being simply oversights; those two were not intentional. They could have been addressed as simply as the section 16 request of the aboriginal groups and the multicultural groups. They could have been accommodated, I feel, before June 3, before Langevin Block.

**Mr. Allen:** Thank you. I have some other questions, more particularly, but I will come back.

**Mr. Sterling:** I would just like to add my thanks. In terms of the historical context from your point of view, I think it is important for us to have that. Having participated in some of the constitutional conferences before, I have some history of it when I was a minister in Mr. Davis's government.

One question: I do not know whether you answered Mr. Offer directly, but is the most important recommendation, as far as you are concerned, the approval in terms of the provincial status by all the provinces and the federal government? Is that the most important one you would like this committee to recommend against? I know what you have said about the omission on the boundary one, but in terms of what they have done.

**Mr. Richard:** Mr. Kakfwi and I do not have any authority from our Legislature to prioritize these items, but personally I have said from the outset in May of last year that the extension-of-boundaries issue is the most important of the five basic issues that we have. I personally put it ahead of the creation of new provinces because, in time, it is going to happen first. It is going to affect us first. It is also the most insulting one of those two. That is my personal view and I think a lot of people agree with me. We do not really have a mandate to prioritize our request. Thank you.

**Mr. Sterling:** I do not know what the first ministers agreed to behind closed doors with regard to sticking fast on what had been decided and not opening it up for any potential amendment, but I would imagine the concern they would have is that once the door was open a little bit, everybody would jump in and nothing would be decided.

If the Meech Lake accord was amended, let us say, for purely clarification cases—and you have

mentioned the Supreme Court judges, for instance, and whether or not they can come from the Northwest Territories and the Yukon—would groups like yours and some of the native groups be willing to distinguish between the two? In other words, would they say, “We will recognize that there are certain issues on which there are clarifications and we will not come forward with the argument,” and then, once the door is open, all the arguments should be heard?

**Mr. Richard:** Minor amendments versus major amendments?

**Mr. Sterling:** Yes. I guess what I am trying to do is get some amendment to this particular accord and trying to find out whether or not some of the minor clarification things can be dealt with before it goes through, if they are as headstrong enough to carry on as they appear to be.

**Mr. Richard:** I do not know. For myself, you know, it is difficult to answer that.

**Mr. Sterling:** Yes.

**Mr. Richard:** Are you asking, “If we open the door, will you promise to leave after two minor amendments?” There is one that has been mentioned over here. Why will they not even put our outstanding issues on the agenda? I mean, Senate reform and fisheries are there. Why not clauses 42(1)(e) and 42(1)(f)? If you consider that a minor one, then we will move that to treat it in a minor way so that we are entrenched. We are going to go back to the first ministers’ conference next year.

I do not know how else to respond to that. I am one Canadian who is vehemently opposed to this rush. We all read in the paper about up in Ottawa they are fighting back and forth between the Senate and the House of Commons on some mundane things like a drug bill and the Canada Post bill. They go back and forth with minor amendments, but yet they will not take the time to amend the Constitution of the country to deal with it in a slower way.

I think the whole process is obscene, the way Canadians, parliamentarians, legislators like you and me, are being rushed into this thing. The most important issue in the country is our Constitution and yet they will not contemplate taking their time. What is the expression that Senator Murray used?—the “egregious errors.” Ask northerners whether they are egregious or not. Sure they are egregious. You know that old expression, “If it ain’t broke, don’t fix it.” I mean this thing is broke and all of us should be taking our time to do it properly.

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**Mr. Sterling:** Your frustration is no greater than the frustration of members of the opposition parties in this Legislature. We are faced with the same problem here; there are six of them and there are four of us, and guess what is going to happen when the recommendations come forward out of this committee? I will hope that they will listen, but I am certain they have their marching orders. I hope they have listened to you. We just found the whole setup of the committee a problem. We stated that in the Legislature and we agree with your comments in that regard.

Having gone through an election on September 10, and having listened to a number of people at the door—and I represent more people than live in the Northwest Territories; one and a half times that number, I guess—when the Meech Lake accord came up, I did not find anyone who was in favour of it. In terms of free trade, I found people on both sides of that issue. In fact, I found more in favour. I represent a high-technology area, which may be part explanation for that issue. On the Meech Lake accord I did not find anybody in favour of it, and more people concerned about it.

Given a choice between it and the status quo, which would you take? Would you prefer what we have and to scrap the accord, period? Are there any positives in it for you?

**Hon. Mr. Kakfwi:** In my view, I think Quebec chose to be left out, I guess, during Lévesque’s time. Now the political environment is different; Bourassa wants in.

I lived in Quebec for a little while during the referendum. I guess I have a lot of sympathy for the nationalism, or the separatism of the day, because I was there. As a Canadian, I am very happy that the accord came about. What I am totally upset about is that these 11 people are telling people like you that, yes, they got Quebec in, which is a great hurrah for them, but they also did some other things which are not good, particularly for those of us who live in the territories. They have taken away certain fundamental rights that we should enjoy as Canadians, but you cannot do anything about those because you are going to screw up the whole deal.

I guess my fear is that you are going to buy that pitch. For the life of me, I cannot see why you should, because it does not require those changes in order for Quebec to be in. It has nothing to do with that issue at all.

**Mr. Sterling:** I guess my feeling on it is that the inclusion or the signing by Quebec of whatever document they may sign is purely a



symbolic matter in terms of the actual fact that Quebec is in or out of Confederation, or is part of Canada. They are part of Canada, they participated in previous constitutional conferences, and they only abstained from voting by their own choice. They could have held up their hand at any point when they wanted to. I just do not think, from what I have seen so far in terms of the objections, and the objections from the people in my area, that the symbolic gesture of Quebec joining is worth the tradeoff. I am just asking you your opinion on that. Do you think it is or it is not?

**Hon. Mr. Kakwi:** I think it is important because they did not sign one document, considered historic. They chose not to sign. It is important for history and important to Canada, I suppose, that the options be narrowed. As you know, Quebec looked at the option of separating. With the signing, I think people who believe in Confederation and Canada as it was or should be, are relieved in one part and in the other part, for us, we are even more alarmed.

**Miss Roberts:** I would like to add my thanks to both of you for coming and giving us an excellent presentation, which has put a different light on many of the issues that I thought were of concern to you.

If I understand your basic feelings, the first one and most important one is your sense of betrayal in the process that occurred leading up to the Meech Lake accord and to the final signing of the document.

Also, the second thing is your feeling of self-determination. You are here as a Legislature representing many diverse types of people, including an aboriginal group of people, and including all other types of people as well. But you are here, I assume, speaking on behalf of a Legislature. Your concerns are that of a Legislature.

I believe, although I am not a great historian and/or a great constitutional lawyer, that your position in Canada over the past number of years has changed somewhat and, as a result of the Constitution Act of 1982, you felt that certain rights were taken away from you then, that even more rights of self-determination have been taken away from you now.

I would like to zero in on the process. You know what the process has been, the process that is going to occur in the future. Do you feel there must be a change, there must be something put in the Constitution to deal with that process, or is it a matter of receiving some type of assurances that have been spoken of, whether they are letters or

something like that, that will involve you as a Legislature, as elected people, in the process that is going to continue on, by the sounds of it, every year for the foreseeable future?

We are, right now, carving out what our particular committee is going to be able to do in the future in trying to determine what we can do. What do you, as a Legislature, or as representatives of people, think you can do to help in that process of a living Constitution? Because that is what we have right now. We have a Constitution with many growing pains. Have you thought about that? Have you determined how you would like to participate, or even if you would like to participate as a Legislature?

**Mr. Richard:** Ideally, we would like to be included as a full participant in those constitutional conferences contemplated by this document: the two types, the economy and constitutional ones. But at a minimum, we feel in terms of process, we should have what we got in 1982, that the Prime Minister is required by the Constitution to invite us if they are going to discuss matters which directly affect us.

Being very parochial, I can say, "What matter could they possibly discuss that is not going to affect us?" It should be in those clauses in the 1987 document to convene these annual conferences. In my view, our participation should be dealt with in those.

**Miss Roberts:** As a legislative committee? We are not mentioned there as a legislative committee. It is only the first ministers who are to show up, so I assume you would like your government House leader to be there.

**Mr. Richard:** Yes, but we want, at least, the treatment that you have. At least your Premier is going to those conferences. We do not have that. But if they are going to expand it to allow for some wider thing, as you are suggesting—a committee of each Legislature to participate in these things on an ongoing basis; I am aware that someone at the summer parliamentary association meetings suggested that—then certainly we should be there.

We get equal representation at the Commonwealth Parliamentary Association. We are very active in those. Certainly I can see we ought to be included in the wider participation that you are speaking of.

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**Mr. Eves:** What would your reaction be to our Premier's statement that any changes made to the proposed accord would be, to quote him, "unbelievably serious"?

**Hon. Mr. Kakfwi:** My reaction, I guess, is that I hope none of you buy it. This is a plea, if you want to call it that, that you should be equally concerned for those of us who live in northern Canada, in the Yukon and Northwest Territories, as you are about Quebec and any other province. You should not accept the line or the argument that Quebec would be more "out" if you argued that the Yukon and the NWT should be more "in." They are not tied together.

I think you have a responsibility to forget about party lines on a fundamental issue like this. You will notice the Social Credit Party is doing the same thing with Vander Zalm on the abortion issue. The issues we are talking about are fundamental, and you should not buy the line that you cannot mess with this accord because it will unravel. It deserves to be unravelled to a certain extent and it can withstand the unravelling, because the inclusion of Quebec does not demand that the rights of northerners and of Canadians should be compromised. That is exactly what the message is.

**Mr. Eves:** The statement was made earlier that our Premier has referred to the people of the Northwest Territories and the north in Canada as casualties in these talks. If, indeed, our Premier and other premiers, the 11 first ministers for that matter, are sincere that this has been some sort of a genuine oversight on their part and somehow you have been dropped along the wayside, to address the rights and concerns that you have, surely they could agree to clarify and improve upon the accord now before it is adopted by all 11 legislatures, by the representatives who have been elected in the 11 different governments in Canada. Do you not agree that the accord should be amended first and not at some future meeting of first ministers along the way?

**Hon. Mr. Kakfwi:** We think we do not have any other avenue. That is why we say it is degrading. We have to come to a committee like yours in a totally different jurisdiction from ours and ask you, on our behalf, to momentarily halt the process whereby all the legislatures have to approve the Meech Lake accord.

You do have the power to make fundamental recommendations that can meet our needs and still meet Quebec's needs, but you may have to offend your Premier to a degree. Your measuring stick is there, and if you can do it, we would applaud you for all of history. If you do not, I do not know if history will remember what you have done later. I do not write the history books, but I am concerned.

It is a historic time and we all have a part to play in it. We could be complacent about it, I guess. Martin Luther King said that a measure of a man is what he does, not in times of complacency but in times of challenge and controversy, and this is such a time.

**Mr. Eves:** One statement you people made this morning which struck me was that is not just an ordinary bill. Indeed, we are talking about amending the Constitution of Canada here. I could not agree more that this one issue should rise above partisan politics.

I find it somewhat repugnant as a Canadian that other Canadians, regardless of where they live, are not being treated equally with respect to equal access for appointment to the Senate and the Supreme Court, as you have pointed out, and with respect to changes in their boundaries or to the very fundamental right to become a new province. They are not given the same basic ground rules and equal playing field that other provinces have been given over the period of Canadian history.

There has been much talk in this committee about process, how the process has gone wrong and how we can improve it in the future. I have a suggestion and I hope you will agree that one large step that all members of this committee and this Legislature can take towards improving the process is a free vote on this very nonpartisan matter. Do you agree or disagree?

**Mr. Richard:** I agree.

**Mr. Eves:** I have no further questions.

**Mr. Allen:** Could I just ask whether the Northwest Territories has joined the Yukon in laying a case before the Supreme Court of Canada with respect to those equal rights or, if you have not, are you contemplating doing that? It does seem that there is at least a prima facie case there, that under the Charter of Rights citizens of one part of the country do not have equal access to the processes and rights that are accorded by the charter ostensibly to all Canadians. There is substantial ground for a submission to the Supreme Court for a ruling on that and for inclusion in the process.

**Mr. Richard:** We have. The Yukon government has launched a case and one of our citizens, Mr. Sibbeston, who is our former government leader, has launched a court case in his own name, arguing charter rights. Both those cases have now gone, on preliminary issues, through the courts of appeal of the Yukon and of the Northwest Territories. Mr. Penikett can speak for the status of his case when he sees you this



afternoon. Our Minister of Justice announced earlier this morning that our government is going to seek leave to appeal to the Supreme Court of Canada in our own court case.

**Mr. Chairman:** Thank you. It is nearly 12:10. We have arranged, if you can stay with us for lunch—there have been some discussions with your staff, and if you are able to stay, along with Mr. Penikett, we will be able to carry on perhaps with some of the members who are free to discuss some of these issues.

I was reminded, when you were talking about the desire perhaps of some provinces to take over some of the territories—the example I thought perhaps you were going to quote, which was very graphic—I believe it was at one of the 1968 conferences that the former Premier of British Columbia, W. A. C. Bennett, actually had a map which came out behind him. In those days, television was not always in colour, but he had a great green expanse for British Columbia, which went on up and took in the Yukon, and he was dubbed the Jolly Green Giant at that point.

When I was first listening to the concerns that you had in that regard and I was trying to think if there were any examples, that one came back to mind. I guess there are a number of things there, as Miss Roberts said, that you have brought to our attention which, quite frankly, as we have been aware of the position of the Northwest Territories and of the Yukon, we have not given a great deal of thought to. We thank you very much for coming today, because you have given us a number of points that we do have to consider.

I would like to make very clear as well, and I just feel this is very important, that as members

of this committee, we have to consider the testimony that you and others are presenting to us. At some point we are going to have to consider a lot of other factors, and obviously, as politician to politician, we have some difficult matters we are going to have to wrestle with. But I do not think there is anyone on this committee who agreed to come on to this committee without saying, “I am going to listen to what people say to me and try to determine, as honestly as I can, where we ought to go.”

Obviously, we would all have much preferred if this had come to us without what has happened with the 11 first ministers. We are going to have to wrestle with that, but I think what is important is that the statement you have made today, both in terms of its substance and its feeling, is critical for us to understand as we proceed down the road. We all thank you very much for that. I hope when we do get to the point of our specific recommendations, we will be able to keep in mind our responsibilities and move this forward. I thank you very much for coming.

Just before we break, the clerk has one announcement to make and then perhaps we can head out for lunch.

**Clerk of the Committee:** Just to remind you that the brief for the first presentation this afternoon by Tony Penikett was sent to your offices yesterday afternoon, if you could remember to bring it.

**Mr. Chairman:** Thank you very much. We stand adjourned until two o'clock.

The committee recessed at 12:12 p.m.

## AFTERNOON SITTING

The committee resumed at 2:06 p.m. in room 151.

## HONOURABLE TONY PENIKETT

**Mr. Chairman:** The Honourable Tony Penikett, Government Leader of the Yukon, is going to be our first witness this afternoon. On behalf of the committee, Mr. Penikett, I thank you very much for joining us today. I believe you were here for part of the presentation this morning that was made by representatives of the Northwest Territories, so in a sense we are immersing ourselves in some of the views and ideas of the governments from the north.

I know you have a presentation that was given to us yesterday afternoon. We are in your hands as to how you proceed, but please go ahead.

**Hon. Mr. Penikett:** Thank you. I am pleased to participate in this exercise in northern immersion.

Let me ask you to imagine that one morning Ontarians woke up and found that during the night, nine provinces and the federal government had, at a secret meeting by a lake, decided to suspend this province's membership in Confederation.

What if, perhaps in a fit of pique at Toronto, the other premiers and the Prime Minister of Canada had decided that Ontario could not re-enter Confederation until all 10 concurred? And what if there were no guidelines as to how the discretion of each premier and the Prime Minister was to be exercised on this question?

Surely Ontarians would be more than a little concerned if they found as well that the possibility of other provinces extending their boundaries into Ontario was suddenly a real possibility.

How would residents of Ontario feel when they discovered that they were no longer eligible to be appointed to the Senate or the Supreme Court of Canada? Would their bitterness at this treatment not be even greater when they considered how they had been denied access to or even input into the decision that had transformed their constitutional status?

Would people in this province accept such an arrangement if it were applied to them? I think not. "It couldn't happen to us," you might say. Perhaps not. But that, I submit, is what happened to the Yukon last year in April.

When most Ontarians hear the word "Yukon," they may perhaps think of the land described by

Jack London, Robert Service or Pierre Berton. Perhaps members of the committee here picture a land peopled by Indians, prospectors, trappers, dance hall girls, gamblers and gold seekers. There is something of this still in the Yukon Territory, but Yukoners are more than quaint characters limited by the pages of Robert Service. We are citizens of Canada, and right now we are deeply concerned that our interests, our aspirations are being given short shrift by the rest of the country.

The Meech Lake accord discriminates against tens of thousands of Canadians solely because they have chosen to live north of the 60th parallel. It makes provincehood virtually impossible for the territories, it denies us the right to hold certain specific national offices and it was arrived at without either our knowledge or consent, and we are angry.

The proposal as it now stands states that the unanimous consent of all provinces as well as the federal government must be achieved before a territory can become a province. We know that unanimity has been rarely achieved by the first ministers. Our recent experience with the aboriginal self-government proposal gives us as northerners no reason to believe that this perfect apolitical harmony will be found in the future, especially when territorial as opposed to provincial interests are at stake.

But even if unanimity were possible, even if the north were over-reacting and all the first ministers decided to smile upon a proposal for provincehood at the same time, how can one justify allowing the representatives of every other region of Canada, except that region most affected, to decide the north's place in Confederation?

Surely this is the very opposite of self-determination. Surely this is a rule fit for a gentlemen's club in the 19th century rather than a democratic society in the 20th. And it is a rule, I suggest, that is ripe for abuse. Decades from now the territories could be a million strong but still be blackballed from the club for reasons of immediate political expediency if, for example, the south felt it needed guaranteed access to the north's oil and gas.

Some have insisted that this is not the intent of the unanimity rule. But then, what is? Why are the rules being changed for new provinces? What was wrong with the method whereby the present 10 joined Confederation? Prior to 1982, the door



was open to us. In 1982, the door was closed. Now, in 1987, it has been barred.

We in the north feel strongly that the process by which the accord was reached was a violation of our right to self-determination. The first ministers failed to consult northern Canadians about matters fundamentally affecting their lives. It is bad enough that we have no vote, but to have been granted no voice in this process is simply outrageous.

In the north we feel strongly enough about our lack of input into this decision that we are challenging the constitutional accord in the courts. Our petition seeks a declaration by the court that the absence of consultation is inconsistent with conventional democratic principles; that we were, in short, denied natural justice. We also claim that there is a trust responsibility owed by the government and the Parliament of Canada to the people of the north, a trust responsibility writ larger by our absence from the table.

At present, our action and that of the government of the Northwest Territories are concentrating on preliminary questions of justiciability. Although both actions found some procedural favour at the trial level, both were reversed at the Court of Appeal. But this is not a publicity ploy for us. We intend to appeal those decisions to the Supreme Court of Canada. We are determined to explore fully every possible means for securing our rights as Canadians.

As well as jeopardizing our future constitutional status, the accord also wreaks a present-day injustice on some of our citizens. The territories, unlike the provinces, will not have the right to nominate senators or Supreme Court judges.

Yukoners are pleading today, pleading that you uphold their democratic rights in a way that is consistent with those enjoyed by Canadians from St. John's to Victoria. We urge you to extend to the Yukon nothing more or less than what the accord offers your own constituents.

Specifically, we urge you to amend the accord as presented to this body. We ask that (a) new sections 41(h) and (i) of the proposed amendment be deleted; and (b) the word "territories" be added after the word "provinces" in sections 25(1), 25(2) and 101(c)(1) and 101(c)(2), so that Canadians living in the north might be nominated by their regional governments for appointments to the Senate and the Supreme Court respectively.

The deletion of the proposed sections 41(h) and (i) would leave the establishment of new provinces and the extension of existing bound-

aries to agreements between the federal government and the people directly affected.

I want to state quite clearly here that we are not opposed to the accord as a whole. It is vital to Canada to have Quebec endorse the Constitution as a full partner. Like other Canadians of every region and every political stripe, we are pleased to see national unity promoted through Quebec's signing of the Constitution. But we ask, is it necessary to freeze out the north in order to achieve this? We suggest that the Constitution can be amended to meet Quebec's legitimate needs and yet still allow for the creation of future provinces.

Keeping the door open for the creation of new provinces in the northern territories need not and does not threaten Quebec in any way. We do not work with a limited stock of federalism. To extend the full protection of the Constitution to one jurisdiction does not mean that corresponding rights must be taken from another.

It is understandable that Canadians greet with enthusiasm what appear to be solutions to long-standing constitutional conflicts, but that enthusiasm must not be allowed to blind us to the fact that solutions may be creating new conflicts. Canadian experience suggests that these new constitutional errors will not be remedied easily or quickly. Before we amend the Constitution, the practical implications ought to be clear. We ought to be positive that the proposed amendments will serve the future, as well as the present, interests of all Canadians.

Our national identity has been entwined in the north since the birth of our country. Our national image is built on the majesty of the north. In the eyes of the world and in the hearts of Canadians, the north is integral to the definition of Canada. We in the north wish to ensure that our treatment of northern Canada reflects the kind of country we are, the kind of country we want to be.

I will remind you that Canada at the time of Confederation had only four provinces: Nova Scotia, New Brunswick, Quebec and, of course, Ontario. In contemplation of the creation of the Dominion, the London Resolution of 1865 stipulated that if Prince Edward Island, British Columbia and any other province which might be created from the Northwestern Territories wished to join in Confederation, they be admitted on "equitable terms."

When Manitoba was created, the Constitution Act of 1871 clearly set out Parliament's exclusive authority to admit new provinces:

"The Parliament of Canada may from time to time establish new provinces in any territories

forming for the time being part of the Dominion of Canada, but not included in any province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such province, and for the passing of laws for the peace, order, and good government of such province, and for its representation in the said Parliament."

The subsequent admission of British Columbia, Prince Edward Island, Alberta and Saskatchewan was negotiated directly between each province and the federal government. In not one case was the assent of any other province required.

The existing conditions for entry faced by the Yukon and the Northwest Territories are already far more onerous than those met by any other province. As you know, the Constitution Act of 1982 amended the admission formula so that the seven-and-50 rule applies. The north was definitely being asked to leap higher hurdles than those who had gone before.

At the time of the amendment, northerners vigorously protested the imposition of these new requirements. Every single legislator from the Northwest Territories journeyed to Ottawa to press the northern case. Yukoners, too, voiced their concerns and their outrage.

One of the louder voices came from Erik Nielsen, then MP for the Yukon. In his statement in Hansard on November 26, 1981, he demonstrates that the constitutional status of the north is an issue about which every single northerner feels passionately. Let me quote him:

"For over half a century...the dream of provincial status has been the lodestone of northern hopes. It has been central to the vision of the north which sees the development of the Yukon and the Northwest Territories as the best and brightest hope for Canada's future. When the Prime Minister accepted the inclusion of two clauses in the April accord relating to 'the extension of existing provinces into the territories' and 'notwithstanding any other law or practice, the establishment of new provinces,' he dealt a crushing blow to the hopes and aspirations of thousands of Canadian citizens resident above 60. He gave away what was not his to give—the rights and privileges of Canadians of northern Canada above 60."

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To us in the north the amending of the Constitution in a way which promised to make it impossible for northern territories ever to gain provincial status was a breaking of faith. We do

not think we were alone in recognizing the fact that these entry provisions were unfair.

Attached to the 1983 constitutional accord on aboriginal rights, an accord mentioned by our colleagues from the Northwest Territories this morning, was appendix A, an agenda of outstanding items, items unresolved in the 1982 constitutional debate. Obviously, these were items that the federal government felt were of importance as the government wanted to deal with them at the next meeting.

Agenda item 4 specifically requested the repeal of sections 42(1)(e) and (f), which deal with the creation of new provinces and the extension of provincial boundaries. As well, in its discussion paper on the draft amendments, the federal government stated, "The intention would be that the Constitution of 1871 would operate rather than section 38(1) of the Constitution Act, 1982." In other words, it was the intention of the Trudeau government, at that time, to remove the impediments to the territories joining Confederation which had been placed in the Constitution at the last moment in 1982.

We in the territories, therefore, believed that the problems in the 1982 formula were apparent to all parties and that there was some consensus that they required change, because nine provinces and the federal government had signed the 1983 accord. The parties to the 1987 accord, unfortunately, did not improve the 1982 formula; they did not correct its unfairness and its inequities; incredibly to us, they made them worse. Seven people who signed the 1983 accord also signed the 1987 accord, completely contradictory positions. So far, we have been given no explanation whatsoever as to why the clear intention of 1983 was reversed in 1987, without, I might add, any consultation with the elected representatives of the people most directly affected.

I would ask you just to consider for a moment the Canada we would have today if the 1987 formula had been applied when the extension of boundaries and the creation of the post-Confederation provinces were being considered. A map of Canada would show only Nova Scotia, New Brunswick and a strip of land along the St. Lawrence River and the Great Lakes. Provinces seeking to maintain the status quo, to protect special interests and to exercise narrow jealousies could have refused the extension of boundaries and/or the admission of new provinces. Our map would show Canada as a small nation state with British territories or perhaps independent



nations to the east, west and, dare I say, to the north of us.

Fortunately, earlier federal and provincial legislators had a larger vision of the federation that was to be Canada. They anticipated and encouraged the development of the territories and facilitated their admission into Confederation. We believe that this generosity of vision must be maintained.

Underlying the specific injustices that we in the north perceive is a fundamental wrong. Earlier, I spoke of natural justice and I cannot emphasize too strongly our anger, our frustration, at the denial of our right to be heard and to have reasons given for the decisions made which will affect us.

The leaders of the Yukon and the Northwest Territories were not invited to the original Meech Lake meeting, even though our constitutional fates were as much at stake as were those of any other jurisdiction.

In the weeks following the accord, I contacted each and every Premier to explain our dilemma. We articulated many times our concerns to the Prime Minister's office. Our ministers contacted their federal and provincial counterparts, as have our officials. Even though Mr. Sibbeston, the then-leader of the government of the Northwest Territories and I went to Ottawa on June 1, 1987, we were not invited to the premiers' all-night meeting at the Langevin block.

On the evening before the meeting I finally received our first acknowledgement from the Prime Minister of Canada, a short note promising to represent the interests of the north. His complete failure to do so is what prompts me to continue to seek support for changes to the Meech Lake accord. I repeat, it is fundamentally unfair that our fate, the fate of the people of the north, should be decided by others, by every other region in Canada, by 11 men in a locked room, most of whom have never even seen the north, let alone lived there and known its people.

It is fundamentally undemocratic for our citizens to be denied representation in a process that affects their rights. You would not tolerate it here in your province. Why should you allow it to be imposed on others, your fellow Canadians?

The unfairness of this situation, as Mr. Richard mentioned this morning, was recognized in the recommendations of the special joint parliamentary committee on the accord. Although the majority report did not endorse amending the accord, it acknowledged, in paragraph 39 of chapter XV, "The principle of the 'equality of the provinces' is important, but in

our opinion it is carried too far if it imposes artificial and unnecessary constraints on the natural evolution and development of the northern third of the land mass of our country."

We in the north are perplexed and frustrated by the first ministers' apparent disregard for the rights of those of us who occupy the region of Canada so often linked to the country's future wellbeing. The normal evolutionary process of constitutional development would see the Yukon increasingly have the right to self-determination in matters of social, economic, cultural and, of course, political self development, culminating some day in provincial status. Instead we see Canada turning its back on our progress, refusing to acknowledge our rights.

The Yukon and the Northwest Territories are not provinces now, nor do they seek provincial status at this time. Few people in the north would argue that we have reached the point where provincial status makes sense. We are keenly aware of the limitations imposed by our small dispersed population, our limited economic base and our underdeveloped infrastructure.

But this does not mean that additional, artificial limits should be imposed on us, or that rights so fundamental to other Canadians that they take them for granted should be denied. Yukoners quite naturally wish to play a role in the country's major institutions. We want to continue to work for provincehood at some appropriate time in the future. To have that possibility extinguished at this time would erode our faith, not just in the future of the north but in the vision of this country that Canadians have embraced since Confederation.

Ladies and gentlemen, what we are asking you, the leaders of Ontario, the members of this Legislature, is do you want the north to be part of Canada. Do you accept our right to determine our own future in Confederation or do you, in effect, believe that Confederation is now complete, that there is no more room? Do you admit the possibility of a Supreme Court judge or a senator from the north, or would you argue that Yukoners, who have sent a Speaker, a Deputy Prime Minister and Canada's second woman MP to Ottawa in this century, are not equal to national office?

I believe that your well-known commitment to democracy, fairness and equality should answer these questions for you. Thank you.

1430

**Mr. Chairman:** Thank you very much, Mr. Penikett, for setting out again, I think very clearly, the concerns which have been expressed

from the north. Again, I know that there are good number of questions, so if I might move then directly to questions, Mr. Breauh.

**Mr. Breauh:** Tony and I have known one another for quite a long period of time and so I think I have a little bit of sense as to what kind of person he is. I want to put a couple of kind of strange questions to you, Tony.

If I were you, what I would want most of all right now, with some urgency, is to regain my proper place at the table. I would like some amendments, I would like some things not to happen, but most of all, I would want back in the game. Of all the things I see happening to the people in the north, the one major hurt—and it is a substantive one right now—is that you thought you had a place at that bargaining table. You thought there was a clear-cut agreement on how to proceed from here, and all of that has been swept away from you. I would be asking the rest of Canada, “Just give me back what I thought I already had, which was a place at the table, a voice during the course of these negotiations and opportunity to put in front of the rest of the country what they already have.”

Is that a reasonable summary of where you are at?

**Hon. Mr. Penikett:** I think that is a good summary. Maybe you would have saved me a lot of time if you had done the presentation.

Having a place at the table, we discovered, is not sufficient. We sat at the table for the years between the 1983 accord, which I mentioned, and March whatever it was this year when the process on the aboriginal rights and other matters ended. We were at the table. We had a voice. We were at the table through the ministerial meetings. We were at the table through the first minister's meetings.

I spoke in that caucus, and we were more than ready to get to agenda item 4, which would we thought on the nod, as a matter of routine approval, have repealed the unhappy 1982 rule on the creation of new provinces, the seven and 50 rule; revert it to the 1871 rule. Nobody in the north expected anything different. That is what we anticipated because nine of the provinces and the federal government had signed it.

It was an incredible shock to us to watch these 11 men lock themselves up at Meech Lake and come out with a new rule affecting our future, with no consultation with us whatsoever. Being at the table once or being at the table twice is not enough. Perhaps even guaranteeing that we would be at the table would not be complete assurance. What Mr. Richard said this morning

is true, that as a result of Meech Lake our status has been diminished because now we have difficulty even getting on the agenda for those conferences under the rules for establishing the agenda now.

I do not believe, nor do aboriginal people I think believe, there will be another aboriginal first ministers' process. For us to have to fight for response somewhere between Senate, fish and other matters is, in our view, an extremely unattractive proposition, especially since we will not even have a voice in the discussions by which this agenda will be drawn up.

We are not optimistic or hopeful at all about that, nor, frankly, are we confident about the proposition that some people put to us, “We will wait till this thing is done and then we will get around to you later,” because we do not like what was done to us the last time. To be frank, we have no confidence that matters of vital interest to the territories will be dealt with generously or fairly by a group of people who are dealing with contending provincial issues.

**Mr. Breauh:** Let me try a concept on you that is frankly outrageous, to my mind, but as I read this accord you cannot eliminate it. I want to just get your reaction to it. If one read this document carefully and if one put evil motives on people, one could say that there is no future for the Yukon or the Northwest Territories. Something that Mr. Richard talked about this morning, boundary changes, may seem to be a small matter now but may, in fact, turn out to be something of some great significance.

Is there any feeling in the north that what is happening here is that the provinces will now divvy up the riches of the north, the resources that are yet untapped; that there will be no future development there of the Northwest Territories or the Yukon into provincial status; that the Meech Lake accord rather takes that off the agenda; that you do not have a place to voice your opposition to such schemes; and that several of the southern provinces could simply stretch their boundaries into the north and lay claim to the resources that are there now that we know about, and others that people are anticipating in the future? Is that a real concern in the north?

**Hon. Mr. Penikett:** Let me answer your question succinctly: not in those terms. I will explain why. I do not want to muddy the waters, but I think ex-Premier Lougheed recently made a statement to the effect that provinces, as a result of free trade, will never again enjoy the control over resources that they once had. That was for us a very poignant statement, given that we have



never enjoyed that control. We now have a situation where we are never going to, but not because of Meech Lake so much alone but because of a whole series of events.

I have to say personally—and I speak as a Yukoner here and not a resident of the Northwest Territories—that I do not share the same anxiety as Mr. Richard does about the extension of boundaries north. I will explain why.

The Northwest Territories Legislature was not patriated to the Northwest Territories until 1967. If you are a resident of the Northwest Territories, from that point of view, or rather an aboriginal person in the Northwest Territories, you might say that settler governments, as they are called, have been chipping away at your territory ever since we got here.

The Yukon's perception, I think is very different. We were carved out of the old Northwest Territories in 1898, and arguably our Legislature is older than that of Saskatchewan or Alberta.

So I would think, notwithstanding Mr. W. A. C. Bennett's lunatic schemes of a generation ago, there is no possibility whatsoever of British Columbia extending its boundaries north and any serious proposal that they do so would, I think, be to invite armed resistance on that score. I do not think I am exaggerating. I think you are more likely to have petitions from northern British Columbia residents to join the Yukon than the reverse. So from our point of view, we have no paranoia on that score.

I forget the gentleman who put the question this morning, but in one respect Yukoners may be entitled to take comfort from the Meech Lake accord because the fact that you require 10 provinces to consent to such a land grab makes it, it seems to me, a less likely event than when seven or one might have been able to do it on their own.

For us, if you ask me for a hierarchy of concerns, the veto power on the creation of new provinces is a much more serious concern for us, perhaps because we have always assumed we were closer to provincehood than the Northwest Territories, but perhaps also because I do not really believe that in this day and age—it might have been true at one point—a province could successfully expand its boundaries into the Yukon.

The Northwest Territories are also different, I suspect, because I understand Quebec has some outstanding claims in James Bay and to islands in Hudson Bay, and that is an unresolved issue. Even at that, I think you could argue either way

that it is unlikely that the other provinces would stand by and watch Quebec advance those claims. I think it is unlikely that Newfoundland would support such a proposition, for example, given its history.

**Mr. Breaugh:** One final little remark which I think we discussed a little bit this morning. A lot of people who are elected in the north have been on the road a lot in the last year, seeking to get some information, some clarification, some reasons why these things were done. You went into that somewhat in your presentation and your opening remarks. Has anybody given you any kind of explanation as to why the Yukon and the Northwest Territories were excluded, even when they were knocking on the door while the hearings were under way?

**Hon. Mr. Penikett:** No good reason has been given as to why we were excluded, except: "That is the way the country is. You guys do not have a vote and the provinces do." Mr. Trudeau changed that, though, with respect to the aboriginal rights question. Presumably, I think there would not have been terribly much objection, when we were discussing a matter that affected us, such as the creation of new provinces, if the territories had been invited in by the Prime Minister. I do not think any province could have reasonably objected had that been done.

The real reason it happened to us, of course, is because we were not there at the table. I mean it is pretty hard to argue convincingly either a paranoid thesis that the provinces were out to get us, if you look at the 1983 accord. In fact, I would argue since the provinces have been so incredibly inconsistent on this question—for example, prior to 1982, in 1982, in 1983 and then in 1987, I mean they have zigzagged all over the map on the question of the veto power over the creation of new provinces, and it is pretty hard to argue that there was any real interest, any real passion, any real consistency or any real intelligence being brought to the question. But I do not completely buy that this was an accident, a casualty, an unintended consequence. Somebody had to have an agenda here. Somebody had to want to have this happen.

Frankly, I think we have not been given the straight goods. I do not know what the straight goods are and maybe there are different agendas in different provinces, but it seems to me that when we are told, "Do not worry about this power being in the Constitution. We do not intend to use it," I have a lot of trouble with that. We are not talking about a municipal bylaw here.

We are talking about a power being put into the Constitution of the country. If you tell me, as some provincial Premiers have, that, "We do not intend to use it," then I ask you what the hell do you want it there for? I mean you look me in the eye and you tell me you need this power if you do not intend to use it. They will not and they cannot; or they fall back and say, "We do not want to unravel the accord." We do not want to unravel the accord either. All we want to do is put another buttonhole in the coat.

1440

**Mr. Elliot:** I would like to begin by thanking you, Mr. Penikett, for a very dynamic presentation. Your presentation, along with the one this morning, I think have been most helpful for me personally with respect to understanding the position of the north.

The second thing I would like to do is to put it a bit in context, because I think the people from the north look at Ontario as Ontario, and I think you should realize that people like myself who were raised in Bruce county, and all of my relatives still live in Bruce and Grey, sort of look towards Metro Toronto in the same way that the north maybe looks towards southern Ontario. I would like to relate a story of how I am putting this in context in my own mind, if I may.

I recall as a young man going out on a fishing expedition with my grandfather who was a really dynamic Irishman who owned a farm that bordered on a little village called Desboro up in Grey county. When I drove in the laneway this morning, my grandfather was obviously very agitated and the reason for this agitation I think relates partly to the kind of thing that you and your colleagues have been telling us today.

At the council meeting of the village council the night before a consultant had delivered a plan of action for expansion in the village and they had delivered that morning, just before I arrived, a plan for that expansion. The line that went through my grandfather's farm went right down his lane and split his barn in two. The bullpen and the horses were on one side and the cattle were on the other side. I suspect they could have resolved the taxation problem that was attendant for that kind of division through negotiation, but he suspected very strongly that there were also ulterior motives. In finding out what was involved there, they actually had a game plan to expand the village and were going to use half his farm in doing that.

Now, I think this is sort of the same kind of scenario that we are hearing here today from the people from the north. The vision that comes to

my mind from this morning is when somebody who is head of a government or a House leader of a government is knocking on a door to attend a meeting that is going to, in their opinion, adversely affect the whole region and cannot come through the door. That is a fairly dynamic kind of a vision that will stay with me a long time.

My question really is sort of a supplementary to the one Mr. Breaugh asked a few minutes ago. In this morning's discussion, it was fairly clearly stated I think that the territories wanted to negotiate on their own behalf, say for boundary changes, that kind of thing, with the attendant provinces, the federal government and themselves. I am wondering, with respect to unresolved claims or new claims that might come up with respect to natural resources and that kind of thing, whether you feel because of the history of what has happened in regard to the accord so far, the people from the north would be in a better position negotiating, with the federal government as their exponent and themselves, with the provinces of immediate concern, or whether their position would be a lot safer if they were negotiating with the whole country. I sense that a lot of us feel that we are Canadians first and we would be looking after the interests of persons like yourselves as dynamically as we could, even though our boundaries do not necessarily adjoin with your own boundaries.

**Hon. Mr. Penikett:** Let me answer the question this way. As frustrating as it sometimes is dealing with the federal government, it is, at least for us, a known quantity. They have a lot of experience in the north. They have, in fact, for most of the century governed the north for all intents and purposes.

When we are talking about gaining provincial-type powers there, we are not talking about taking something from the provinces, we are talking about devolving powers from the federal government, provincial-type powers. It is fairly easy to negotiate with one player. What is so immensely frustrating about the Meech Lake accord is that it presents for us the absurd possibility that some day, when we want to join Confederation, we have to negotiate not just with the federal government; first of all, we have to negotiate a deal with British Columbia, then with Alberta, then with Saskatchewan, then with Manitoba, then with Ontario, then with Quebec, and so on, and then get to the federal government.

We might go to BC and finds it wants something from us in exchange. God knows what it would be. Alberta wants something else, and



so on. Newfoundland wants something extra in the way of fish before it would let us into Confederation. Ontario wants to make sure we will never become another Alberta in the question of energy. Quebec wants to make sure—who knows, I cannot imagine what it would be, but it would be one thing or the other. We would become the kind of Namibia of Canada; everybody else governing you except the people who live there.

To me, it would be a preposterous situation for us to have to go cap in hand as a democratically elected government, a people who are entitled, I think, in Canadian terms and United Nations terms to self-determination constitutionally, to have to go begging from all the other provinces. It is bad enough to be a colony of Ottawa, but to have to suffer potential provincial imperialism as well is galling in a country that calls itself democratic.

I cannot articulate to you how emotional and how outrageous that proposition is. By the time we come to apply to join Confederation, I will make a prediction to you that the population of the Northwest Territories and the Yukon combined will exceed that of Prince Edward Island. The idea that the people there should vote and express themselves in the question of joining Confederation and then have to hawk themselves several thousands miles away to ask the permission of a Premier of a province who has never even been there to join Confederation is outrageous.

Our closest neighbour, Alaska, when it joined the union in the United States, did not have to get Rhode Island's permission. Anybody who suggested they had to would have been laughed out of the state. It is such a monstrously lunatic proposition, from our point of view, in a democratic society unless you want to sanctify some kind of fraternity club rules as a constitutional principle in this country. I could not get into a fraternity in a university even if I wanted to, so I have some faintly dubious notions about that.

**Miss Roberts:** Neither could I.

**Mr. Elliot:** I have a supplementary, if I might. I think you addressed the problem with respect to becoming a province, but the kind of thing I was relating to was more like a boundary dispute with a province and how you would stack up arguing with a province, with the federal government in the mix.

**Hon. Mr. Penikett:** For the Yukon, I would not be worried about BC having ambitions on that score. If they did, it would not happen. I do

not exaggerate in saying there would be a violent reaction in our territory to such a claim. I am enough of a Canadian and enough of a Canadian patriot to believe that the people of Ontario would object to such a proposition and, at least on that kind of question other provinces would be our champions, even though I think, in the normal course of things, we all have a constitutional arrangement where we can be at the table looking after our own interests rather than having to depend on a proxy.

**Mr. Elliot:** So you do see an advantage in having the other provinces on your side in that kind of dispute?

**1450**

**Hon. Mr. Penikett:** I conceded that, and that is the one respect in which I may have a slight difference of opinion with our colleagues from the Northwest Territories; but they have different and quite appropriate historical concerns in this matter.

**Mr. Elliot:** I understand.

**Hon. Mr. Penikett:** They have many more provinces bordering them than we do, for one.

**Mr. Eves:** I note with interest your proposed changes or amendments to the accord on page 10, which seem to be fairly simple, and at the same time would be very succinct and resolve the problems that you see with the proposed Meech Lake accord.

On page 20 you indicate that in the weeks following the accord you have contacted each Premier to explain your dilemma. We have heard, not only from the Northwest Territories this morning but also from others, that the Premier of Ontario (Mr. Peterson) opposes any changes because he believes they would be unbelievably serious and would in fact maybe jeopardize the entire accord.

We also heard that he indicated to the Northwest Territories that they unfortunately were a casualty of the Meech Lake accord. What was the reaction that you obtained, if any, from the Premier of the province of Ontario?

**Hon. Mr. Penikett:** In private conversations he indicated considerable sympathy with our position, and I think earlier this morning you heard that at a certain point Ontario may have had some ambiguity about some provisions in the accord. I cannot speak with authority on that.

I know the official position that the Premier has taken in correspondence with me is much more inflexible than he may have appeared in premiers' conferences and other meetings where I have had occasion to talk to him about this. But

I also am confident that the Premier of your province takes seriously the process which you are engaged in here. If this committee recommends the simple constructive improvements in the accord that we are proposing, then I believe he would genuinely advance those in the national forums. If I did not believe that, I would not be here.

**Mr. Eves:** Would you believe the members of this committee will be permitted to have a free vote, totally unbiased by their partisan political stripe?

**Hon. Mr. Penikett:** I am a parliamentarian, as you are. I know that there is only a limited extent, especially on constitutional matters, to which I could instruct members of my caucus. I believe that private members in the British parliamentary system are entitled to take a voice and, I think, help to form policy on these things.

The question you are asking implies a criticism of the process by which we came to this accord, and that is a criticism that I would share.

**Mr. Allen:** Thank you for your very persuasive presentation, which you presented with a good deal of feeling which I think has touched us rather deeply.

A number of my questions have been answered or responded to, but you did touch in passing, in answering my colleague with regard to provincial aspirations, that the government in question that probably had most to lose in terms of powers and jurisdiction was the federal government. I wonder if you have any reason to think it is in that court your problems essentially have lain with respect to the clauses that concern you most; namely, the extension of boundaries and creation of new provinces.

**Hon. Mr. Penikett:** I think one of the problems is that we no longer know, as we thought we did at one time, what is the process of evolution towards provincehood. At one time, I think we assumed that as our population grew, our economy expanded, our government became more self-reliant, as our financial dependency relationship was reduced with the federal government, we would reach a point, as did other territories or other jurisdictions in this country, where we would apply for full membership in Confederation and we would be granted it.

Along the way, the traditional notion in our territory has been that, as they have been over the years, federal-provincial-type programs have been devolved from the federal government to us. For my party, wanting to avoid the British Columbia example, a settlement of aboriginal land claims was an absolute precondition for

provincehood. Having said that, we then thought it would be a matter of internal debate in our community. At a certain point a government would be elected or a resolution would be passed in the assembly or there would be a referendum or something by which our community would express its wish to join Confederation and terms of entry would be negotiated with the federal government. That changed in 1982.

In 1983, we thought that problem was settled. In 1987, all of a sudden, out of the blue, comes this new scheme which, to us, seems to make our long-held constitutional aspirations impossible. Even while that was going on, though, we have been negotiating program devolution with the federal government. Those are often difficult negotiations but they are going on, as are our land claims negotiations—twin track, parallel track—towards something akin to provincial autonomy in our area.

In fact, we are very close to having almost all the powers of a province, except those over natural resources, in the Yukon, and I think we are actually very close to an aboriginal land claims settlement. Once we had passed those two points, we always assumed that provincehood would be just a matter of time.

I hesitate to say this but I think we now have reason to fear that if the Meech Lake accord is adopted unamended, we may have some provinces take an unfortunate interest in some of those devolution discussions, from our point of view entirely inappropriately. They may claim a right, as a result of the Meech Lake accord, to have a voice or to put them on the agendas of the first ministers' conferences. That, to us, would be an absolute nightmare. I do not exaggerate: it would be a nightmare.

**Mr. Allen:** Is the natural resources question, in your mind, the sticking point for the federal government?

**Hon. Mr. Penikett:** I do not think so. Let me say in tribute to this federal government, I think it has been more willing to talk to us about these things than any previous federal government. I actually think that we have been as a government sloughing into these issues anyway, following a series of bankruptcies, by buying into our largest forest products company and taking a role in negotiating development agreements with mining companies. We got into the field without having any constitutional authority, but that is practical politics.

**Mr. Allen:** One way of getting there.

**Hon. Mr. Penikett:** Yes. From discussions we have had, I take it the federal government is



more than willing to negotiate revenue-sharing agreements or accords governing energy questions. We regard that as quite a positive sign. Unfortunately, it appears entirely contradictory to what is happening in the formal constitutional thing, and that is why I think it is confusing and puzzling for our population.

**Mr. Allen:** Can I get some information from you? I am not clear on a number of points. First, how much short is your infrastructure of Prince Edward Island's infrastructure? We all know how much federal government transfer payments contribute to that island's economy and its social assistance programs and so on. How much short in reality are the Yukon and the Northwest Territories of that actual state of affairs?

**Hon. Mr. Penikett:** I do not know Prince Edward Island well enough to make an informed comment, but I think that as a result of the formula financing arrangements we now have with the federal government, the ability to bring, in fairly short order—historically in short order—our infrastructure to a level roughly comparable to Canadians in the south is quite good.

For example, we will be opening a new \$50-million college this fall which will provide substantial capacity in our community to provide post-secondary education north of 60. We now have good roads to all but one of our communities, unlike the Northwest Territories which is still serviced mostly by air.

I think we have made some progress in substantially diversifying our economy. In per capita terms, we are huge exporters of minerals to Asian markets. We have much smaller per capita expenditures on maintaining infrastructure in the Yukon than do the Northwest Territories, where there are different problems. We were settled earlier, we have been in the process of development longer, and I would guess in many ways the quality of our life would be approaching that of people in Prince Edward Island. Perhaps in some particulars it may even be superior.

1500

**Mr. Allen:** So we are really not looking too far down the road, in terms of all realistic assessments of your situation, when provincehood would become a reality.

**Hon. Mr. Penikett:** There is substantial debate by the major parties in our Legislature on this question. I believe that the major opposition party in our Legislature would put political sovereignty ahead of economic sovereignty. We would do the reverse. For myself, I would not want to be the Premier of a broke province,

which is what I think we would be under the existing equalization plan today.

**Mr. Allen:** This morning there was some reference to the ambiguity of the clause on the senate. Is that because there is some understanding that exists now with respect to allocation of Senate seats to the territories, or is there no such agreement?

**Hon. Mr. Penikett:** We have senators now, which is part of the problem.

**Mr. Allen:** OK, I was not clear on that point.

**Hon. Mr. Penikett:** The question is what happens. Both of them are relatively young men. What will happen when they reach the mandatory retirement age or whatever is unclear to me. I take it, given their age, it is not a matter of great urgency. As you may know, the New Democratic Party position in the Senate means that for us this is not the most urgent of questions either.

**Mr. Allen:** Quite. Is there a practice at least of consulting territorial governments with regard to Supreme Court appointments? Is there anything of that?

**Hon. Mr. Penikett:** There has not been to date a Supreme Court judge come from the territories but, as I think our colleagues from the Northwest Territories told us this morning, they have had very well qualified individuals come from their Supreme Court to go to the Court of Appeal.

I think what people take offence at is that the possibility has been denied. To use an American term, every kid theoretically dreams of a chance of becoming president. Well, whatever practical barriers there may be present for some kids, I guess Yukoners would like to think in charter terms that all of us have an equal chance, if we are lawyers or members of the territorial bar, of going to the Supreme Court as much as members of provincial bars. On the same score, our citizens should have a chance to be nominated to the Senate by their regional government the same as potential candidates from this province are.

**Mr. Allen:** Can you tell us anything about Ontario's position in the discussions that were taking place following the accord of 1983 with regard to the admission of new provinces and the provincial boundaries question? Apparently you have the impression, and the territories have the impression, we are reaching a kind of consensus.

**Hon. Mr. Penikett:** It is a puzzling thing. This morning some questions were asked about participation in first ministers' conferences, which I think are much more formal, structured events. Some of you may know that for some

years now we have participated in interprovincial conferences of ministers and all sorts of things. In fact, we have hosted some of those conferences.

It is to the federal-provincial conferences which are the most structured and the most formal that we have the most limited access. At first ministers' conferences the territorial leaders are each given 10-minute slots. I understand some of the provincial premiers last time complained that they did not have much more than that, given the extent to which the Prime Minister dominated the discussions.

We do not see those televised first ministers' conferences as the most important arena, for a number of reasons. We have participated for some years now in the premiers' conferences on a similar basis, although not in the televised sessions but in the closed sessions. At times when this issue or the constitutional questions have been discussed, they have gone behind closed doors and excluded the territorial leaders.

On the occasions when this matter was discussed, when the consensus was building towards the Meech Lake accord, it was done out of our sight and out of our hearing, so I think we did not understand what was jelling there. In many other arenas—mines ministers, education ministers, health and social services ministers—my ministerial colleagues participate regularly and maintain a substantial contribution. Our roles are not that distinct from the other provinces.

**Mrs. Fawcett:** I too thank you for your very fine presentation. Unlike those gentlemen you referred to who were locked in a room or had never been to the north, I had the good fortune this summer to spend two weeks in the Yukon, in the Whitehorse area, and I have to say I was amazed. I admit I did not think that Canada had such beauty. I thoroughly enjoyed myself and would love to go back.

In being part of a few conversations, the Meech Lake accord came up and offhand remarks a couple of times referred to the Yukon then as the 51st state. When you got near the end, "Ladies and gentlemen, do you want the north to be a part of Canada?" that just rang right in my head again. Is that a prevalent feeling or was that just the refreshment of the hot summer's night talking?

**Hon. Mr. Penikett:** Let me tell you, I think most of the people who came in the gold rush were Americans. Quebecers were the second-largest group, as I recall it. We have several hundred thousand tourists come to the Yukon

every year because, as you know, it is an extraordinarily beautiful part of Canada.

**Mrs. Fawcett:** Yes, it is.

**Hon. Mr. Penikett:** It is not well known that we have the highest mountains in the country. It is quite a marvellous landscape. Without either of us asking permission of our national governments, for some years now the Yukon and Alaska have done joint tourism marketing. I probably have more frequent contact with the governor of Alaska than I do with any Canadian Premier.

On the day the Meech Lake accord was announced, as a matter of fact, I was flying to a meeting with the governor in Juneau. Our capitals are actually only 300 miles apart, so we are that close. I thought seriously for a moment of telling the press that I was going to start constitutional discussions, just to see if I could get a reaction in Ottawa. I thought better of it and decided not to.

**Mr. Breagh:** You are mellowing in your old age.

**Hon. Mr. Penikett:** I do not think it is a strong feeling. I think Yukoners are good Canadians, but people are angry enough and frustrated enough to say, "If people in southern Canada do not give a damn, if they are prepared to do this to us and not even ask us before they do it; or even after they do it if the Prime Minister and the premiers are so contemptuous to not even sit down and talk to us substantially about why they did this horrible thing, maybe we should start looking at our options elsewhere."

I notice that our community is now extraordinarily receptive to visitors from Scandinavia, has interesting contacts with Greenland and expanding trade with Alaska. I do not think there are any kind of hostilities, but it is the kind of feeling that, "If our possibility of growth in the direction which we always wanted to go is stunted, maybe we are going to branch out in other directions."

**Mrs. Fawcett:** The geography alone blends; you are there.

**Mr. Offer:** Thank you, Mr. Penikett, for your presentation. I think what has happened from your presentation today is that in terms of process, through your presentation you have indicated that from your perspective there are all different forms of discussion and communication with all different levels of government and ministries involved in different governments. What you have been saying is that in the past, even if you were at the table and somewhat a part of the process it did not help, that there was still a problem involved with respect to the process.



**Hon. Mr. Penikett:** I am not sure I would put it in those terms. I understand and accept, given our present stage of development, that we are not going to have a vote on constitutional matters. That is a given. But I believe that the precedent having been set in the aboriginal rights first ministers' constitutional conference and the aboriginal rights process first ministers' conference, we never expected that we would have a step backwards from that; we would at least be at the table when, to use the words from the 1983 accord, matters affecting our interests were under discussion.

Had we been at the table for the Meech Lake discussions, without a vote but even with a voice, I have enough confidence in the leadership of the territories, whether it was me or my predecessors or the leadership of the Northwest Territories, that we would have been able to bring some common sense to bear and persuade the premiers that what they were doing was insane as far as our interests were concerned.

On the basis of history, I do not believe you could demonstrate there was any powerful commitment by any of the premiers in any direction on this question. I have cited the equivocations in 1981, 1982, 1983 and 1987. I think the reason it happened mainly is because we were not there, not because we did not have a vote but because we had no voice.

1510

**Mr. Offer:** To carry on, in the Langevin agreement there is the provision for first ministers' conferences each year. Certainly, they have indicated what is going to be on the agenda with respect to the Senate and fisheries. They have also indicated "and such other matters." I am wondering if you can share with us what you see your role in that ongoing process to be?

**Hon. Mr. Penikett:** Constitutionally, we have no role. We cannot get anything on the agenda. We cannot get on the agenda. We have no way of even petitioning to get on the agenda, except by continuing to knock on the door. The incredibly frustrating thing to me is that some premiers say, "We will get to you guys later." Somebody some day will put something on the agenda, but presumably they will all have to agree to it being there. We will not get to say what it is, how it is or when it is, but they will. But even then, do we get included in the discussions? I think, as the Meech Lake accord is now drafted, probably not; at least not formally.

**Mr. Offer:** Then I ask the question, do you have suggestions with respect to procedural change?

**Hon. Mr. Penikett:** What we see is that, essentially, Meech Lake freezes us out of Confederation and the processes of Confederation, the constitutional arrangements. If we deal with the question about leaving open the possibility of the territories becoming provinces one day in the way that all the other territories became provinces, then I think we would have less anxiety on that score because we could say that in the not-too-distant future, some day we will be at the table and matters vitally affecting us will get some discussion and we can petition for them; we are playing a role in the premiers' conference and maybe through that door we can have some say.

I think the problem, though, is that if we are creating this new form of executive federalism, this new level of government or new layer of government and are not part of it, our perspective of it would be much the same as I heard from private members in the Legislature now. We are going to have arrangements cooked up, deals cooked up, which are going to be delivered to legislatures as faits accomplis and which the legislatures are then going to be told to rubber stamp.

Judging from some of the peripheral conversation I have heard around the Meech Lake process, I expect that legislators in all provinces and in the federal Parliament are going to be increasingly unhappy with that role, increasingly dissatisfied with that process and, at some point, are going to decide they will not stand for it any more. I do not know what the breaking point will be but I cannot see that is going to go on and on, and every year the first ministers are going to lock themselves up and then hand the decision out to all the provincial Legislatures and say, "Would you mind whipping this through this afternoon?"

I just do not think it will happen. I think at some point democracy will rear its ugly head. I know it would in my Legislature and I am pretty sure it would here eventually. Somebody somewhere is going to have a minority government and that minority parliament will say "Forget it" to its Premier.

**Miss Roberts:** I have really appreciated what you have said to us tonight—tonight, time goes quickly—this afternoon. Some terms you use are very frightening to me. "You are freezing us out." You just said that. You used the term that this particular agreement is, I assume, making it impossible for you to join Confederation at any time.

**Hon. Mr. Penikett:** Practically.

**Miss Roberts:** From what I have heard from you this afternoon, the political reality you seem to be suggesting is that you are a province; except for having passed the resolution, the referendum, you could stand as a province now.

**Hon. Mr. Penikett:** With the existing arrangements we have, with the federal government, and given a land claims settlement—which is the one major missing piece for us, given the fact that aboriginal people are between a quarter and a third of our population—I think we would be a province in all but name.

**Miss Roberts:** Really, in the past you have been treated as a province to a certain extent when they have been talking about constitutional things, but you have been part of the federal team. Am I right in assuming that?

**Hon. Mr. Penikett:** Not for a number of years. There was a time when we had access to first ministers' conferences. As Mr. Richard said this morning, we sat as observers in the federal delegation. I think since 1982, which is six years ago, at some point they refused to do that any more, and at the horseshoe table, the territories for a while sat like a couple of spare nails in the aperture of the horseshoe.

**Miss Roberts:** Holding it up.

**Hon. Mr. Penikett:** In the premiers' conferences, the last couple of them, for example—I will give you a couple of symbolic changes. Instead of sitting separate and apart from the table, we have actually sat at the table with the premiers; and at the last two premiers' conferences, for example, we have been included in the official portrait of the premiers' conference.

Those things are symbolic at a certain level, but I also know that symbolism plays a part in politics. The territorial leaders have been included. I have seen some movement on that over time. I think the one thing which has been totally contradictory in the normal progression has been the Meech Lake accord.

**Miss Roberts:** In other words, you are saying that this has taken away the things you thought you had gained?

**Hon. Mr. Penikett:** In the British constitutional process, I assume it goes something like this: you achieve some kind of *de facto* power and then somebody comes along and legitimizes it after the fact. There is some kind of legislation or resolution or accord which legitimizes and sanctions it. Very rarely, it seems to me, do you achieve a certain level or standing and then have someone try to roll back your progress and

legislate something less than what you had *de facto*.

**Miss Roberts:** So the process the Meech Lake accord sets out—and there is a process there—is one you feel is so much less than what you had in 1981.

**Hon. Mr. Penikett:** It is certainly less than we had with the 1983 accord. The 1983 accord said—I will have to look quickly to find the section—"The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon and Northwest Territories to participate in the discussions on any item on the agenda of the conference covered in subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories."

The precedent established by that, it seems to me, could have mandated Prime Minister Mulroney to have included us.

**Miss Roberts:** That had a three-year limit on it, did it not?

**Hon. Mr. Penikett:** Yes.

**Miss Roberts:** I wonder why that was put in.

**Hon. Mr. Penikett:** For reasons I understand very well. They wanted to set a timetable for trying to achieve the aboriginal self-government provision. All of us know about open-ended processes and how long they can go on. In retrospect, that timetable was maybe an unfortunately short one, but that is not something we can change now.

**Miss Roberts:** In your view of Canada and the federalism we are attempting to create sooner or later, or which we are in the process of creating, executive federalism is not part of it, and most likely is not part of my view either. What process would you suggest? Legislative committees such as this coming with certain recommendations? How can we do this? This is going to happen every year now, should we live that long.

**Hon. Mr. Penikett:** Mr. Holtby's suggestion, which I believe everybody here knew well and heard about, is in the long run probably not a bad one. I suspect, for reasons I understand as a first minister, that you need some executive process to move things along in our parliamentary system, to make arrangements at times. Asking all three parties in every single Legislature in the country to come to agreement on things may be a process of guaranteed complete inaction.

I also think, for different reasons, that the Meech Lake accord is going to be practically paralytic when it comes to constitutional change, especially the kind of constitutional changes we



make. I ask myself, how many times have we achieved unanimity in Canadian history, constitutionally? I think it has been four, something like that. I think the prospect of achieving unanimity on issues affecting the interests of people who are not at the table, who are not represented, is extremely slight. That, from my point of view, means we are extremely unlikely to get satisfaction from the point of view of the aboriginal rights question or on the question of the evolution of the northern territories.

1520

**Miss Roberts:** Then what process do you suggest? Put the Meech Lake accord aside for a minute or two. What process do you suggest we should be dealing with?

**Hon. Mr. Penikett:** The process of cooking up a deal among first ministers and then trying to get the Legislature to rubber-stamp it is wrong. I think the public is best prepared for constitutional debate when legislators have dealt with it first.

That is why I said it could be something like the suggestion of Mr. Holtby that legislators are continually talking about these things too, so that when first ministers come to deal they can be advised by the legislators going into such meetings, and when there is a product legislatures are not taken by surprise and not expected to automatically approve something which they have not previously discussed.

I do not know how often we will be changing the Constitution in the future, but I would expect that if we had something like that, we would have a better informed public about these issues too, and a greater likelihood of presenting something which was a genuine consensus in the community, not just a consensus among the leaders.

**Mr. Allen:** Can I ask one small question, which may be a repetition? I just want to make certain I heard it correctly. Did you say that at the end of the discussions that took place under the accord of 1983, it was your sense that the federal government and the participating provinces had come to a conclusion with respect to reverting to the rules of 1871 for the admission of new provinces? Is there any documentation that can pin that down for us?

**Hon. Mr. Penikett:** This is the 1983 accord on aboriginal rights. Unfortunately, they dealt only with item 1 on the agenda. Item 4 on the agenda was the repeal of clauses 42(1)(e) and (f), the creation of new provinces and extending provincial boundaries. Nine provinces and the federal government signed this accord. The federal background paper—

**Mr. Allen:** They signed an agreement to discuss that?

**Hon. Mr. Penikett:** Yes, to put it on the agenda. The stated intention of the federal background paper was, the intention was, to repeal the 1982 rule and return to the 1871 standard, which was bilateral negotiations between the provinces and the territories.

**Mr. Chairman:** I want to be clear on this. On the same question, I want to be clear that what you are saying is that what was signed was not simply an agenda for discussion, although that was part of it, but that in your view, the federal government at least was making the recommendation that be changed?

**Hon. Mr. Penikett:** All provinces agreed to have it on the agenda. The background is that the federal government, having heard the protests from the territories, had agreed to sponsor, if you like, a motion going back to the 1871 rule, and it was our understanding there was no substantial objection from the provinces to doing that. But unfortunately, we never got to it on the agenda.

**Mr. Chairman:** In the discussions at that time, you mentioned you were not aware of any provincial opposition to that. Did you hear of any subsequently, or was it simply not broached at all?

**Hon. Mr. Penikett:** The direct reference I can find—and I am sorry I cannot cite the reference: there was a *Le Devoir* article which quoted Gil Rémillard saying something like Quebec wanted to have a veto power over changes in federal institutions, and I think there was something in the article that implied the territories were, from Quebec's point of view, a federal institution.

That is a subject on which, of course, we would have a strongly dissenting opinion. In fact, there is a decision of the Supreme Court of the Yukon in respect to a language matter which ruled that the Yukon Territory is not a federal institution for the purposes of federal legislation and is in fact, in the words of the Supreme Court judgement, "an infant province."

**Mr. Chairman:** Mr. Penikett, I thank you again for a very thoughtful and forceful presentation. I think I can speak on behalf of all the members of the committee in saying that with our discussions this morning and this afternoon, we are much more aware of the nature of the concerns which are felt very strongly by the Yukon and the Northwest Territories. We are very grateful that you took the time to come and be with us today and to make your presentation. Thank you.

**Hon. Mr. Penikett:** I can report to our Legislature that you will accept our amendments?

**Mr. Chairman:** Thank you very much. The committee will take a short, two- or three-minute recess while we prepare for the next witnesses.

The committee recessed at 3:27 p.m.

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**M. le Président:** Bonjour. Cet après-midi, nous avons devant nous les représentants de l'Association canadienne-française de l'Ontario. Avant de les présenter au comité, j'aimerais souligner aussi la présence parmi nous d'un groupe de journalistes de la province de Québec. Je pense que c'est à cause de l'accord entre l'Ontario et le Québec. Nous voulons souhaiter la bienvenue aux journalistes qui sont ici ces jours-ci et qui sont à l'arrière de la salle pour la présentation cet après-midi.

Nous avons avec nous cet après-midi le président de l'Association canadienne-française de l'Ontario, M. Jacques Marchand, et le directeur général, M. Fernand Gilbert. Sans plus tarder, Monsieur Marchand, cela nous fait un grand plaisir de vous souhaiter la bienvenue à nos délibérations et je pense que la meilleure chose serait de vous passer la parole. Vous pouvez nous dire comment vous voulez procéder.

#### ASSOCIATION CANADIENNE-FRANÇAISE DE L'ONTARIO

**M. Marchand:** Merci beaucoup, Monsieur le Président. J'ai un texte que j'aimerais vous lire, qui durera environ quinze ou 20 minutes. Ensuite, s'il y a des questions de votre part, je ferai de mon mieux pour essayer d'y répondre.

Comme vous le savez, l'avenir d'un Ontario français est intimement lié à celui du Québec. Une pleine participation du Québec à la fédération canadienne est l'unique garantie de notre épanouissement futur. Aussi les Franco-Ontariens veulent-ils que le Québec se joigne aux autres provinces. Ils voudraient que le Québec participe entièrement au processus par lequel le Canada se dotera d'une constitution qui réponde mieux à la vision qu'a du pays l'ensemble de ses citoyens et ils se réjouiraient d'un accord constitutionnel qui ouvrirait enfin la porte au Québec.

Toutefois, l'Ontario français ne peut pas accepter l'accord constitutionnel de 1987. Il risque beaucoup trop. Ce même accord du lac Meech qui permettrait au Québec de se joindre au fédération canadienne la tête haute, pose un danger sérieux aux autres Canadiens de langue française, qu'il place littéralement hors la loi. Ils

sont donc dans l'obligation de faire le choix très difficile de contester cet accord et d'exiger dès maintenant que la constitution soit modifiée de façon à inclure pour eux des garanties formelles.

L'Association canadienne-française de l'Ontario est venue vous présenter ces modifications sans lesquelles les Canadiens risqueraient d'enchâsser notre assimilation. Nous voulons aussi vous parler du profond dilemme que vivent aujourd'hui 500 000 Franco-Ontariens qui ont besoin du Québec pour s'épanouir au sein du Canada.

En créant ce comité et en invitant tous les groupes et tous les citoyens à lui soumettre leurs observations, le gouvernement de l'Ontario a indiqué son refus de se contenter d'un document insatisfaisant. L'accord du lac Meech est loin d'être parfait, tous en conviendront avec notre premier ministre (M. Peterson). Pour les francophones de l'Ontario, il comporte toutefois des lacunes telles qu'il leur est impossible de l'accepter dans sa forme actuelle en attendant des révisions futures.

Je m'éloigne maintenant du texte de notre mémoire, lequel propose les modifications nécessaires, pour vous parler tout bonnement, comme simple Canadien et comme Franco-Ontarien, et partager avec vous nos inquiétudes et préoccupations face à cet accord.

Je ne suis pas juriste et, par conséquent, je ne veux pas vous apporter des arguments juridiques pour vous faire part de nos inquiétudes. Certains vous diront que, juridiquement et légalement, nos inquiétudes sont mal fondées; mais peut-être faut-il vivre une situation minoritaire pour s'apercevoir qu'il y a un quotidien, un vécu au-delà des textes légaux.

Si je pouvais résumer dans une seule phrase nos inquiétudes, je les énoncerais comme ceci: Que veut dire pour nous l'énoncé que le Québec est distinct, et quelles en seront pour nous les conséquences? De prime abord, il semble tout à fait évident que le Québec soit distinct, mais il se distingue de qui ou par quoi? S'il est distinct de nous, il s'ensuit que nous sommes distincts de lui. Et si c'est son territoire qui le rend distinct, comment cela est-il différent de l'Ontario ou de Terre-Neuve? Mais si c'est sa langue, comment l'est-il de nous, les francophones de l'Ontario?

Puis encore, le Québec étant distinct des neuf autres provinces, les neuf autres provinces sont-elles semblables? Encore une fois, si c'est la langue qui distingue le Québec des autres, c'est donc la langue qui rend les neuf autres semblables et c'est là vraiment que se situe le danger pour nous. Cet accord nous semble beaucoup



plus comme la reconnaissance officielle d'une province française et d'un Canada anglais, d'un peuple québécois et d'un peuple canadien anglais.

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Following the B and B commission, following the great debate of the 1970s, and following especially the new Constitution and the Charter of Rights, we were led to believe, and were believing, that citizens speaking either official language would feel at home anywhere in Canada from coast to coast. We had believed that here in Ontario this great vision was well on its way to realization. We still believe that it must be so, but with this accord we now ask ourselves whether it was only a vain dream.

Nous pensions que la Charte – réalisée, soit dit en passant, sans l'apport du Québec – était le couronnement d'une réalité nouvelle. Qu'en deviendra-t-il? Nous souhaitons que l'entrée du Québec puisse renforcer les droits des minorités linguistiques, mais le coût en deviendra-t-il plutôt l'élimination graduelle du fait français hors Québec?

On dira peut-être que ce jugement est trop sévère et que rien dans ce nouvel accord ne viendra enlever quoi que ce soit à ce que nous avons déjà acquis. On dira donc qu'on n'a rien changé et qu'on préserve le statu quo. Je vous invite à me suivre et à voir ce que ce statu quo nous donne et ne nous donne pas.

Permettez-moi de prendre mon premier exemple ailleurs qu'en Ontario. Vous connaissez sûrement l'affaire Piquette en Alberta. Est-ce le statu quo qu'on veut protéger que d'avoir à s'excuser pour y parler français à la Législature? De plus, dans cette même province, on vient de déterminer qu'on ne peut pas avoir un procès en français. Qui s'est rué à la protection des francophones?

Lorsque requise, la position du Québec dans de telles situations a été donnée clairement à plusieurs reprises, entre autres en 1984 dans le cas Marchand à Penetanguishene, puis dans l'affaire Piquette: Le Québec ne veut pas s'ingérer dans les affaires d'une autre province. Voilà donc quelques facettes du statu quo. Et l'Ontario voudrait signer un accord qui permet une telle chose? et le fédéral? On nous dira ensuite qu'il n'y a pas cause d'alarme? Certains nous diront que la situation en Ontario est meilleure que celle en Alberta. Sans doute que c'est vrai en ce moment, mais quelle garantie avons-nous que cela va durer?

Pour illustrer mes propos, laissez-moi maintenant vous parler un peu du statu quo en Ontario

et nous verrons s'il vaut tant de le défendre. J'aimerais parler plus particulièrement du domaine de l'éducation, car c'est dans celui-là que nos droits sont les mieux garantis. Si le statu quo n'est pas satisfaisant dans ce domaine-là, imaginez-vous les autres domaines, tels la santé, les services communautaires, etc.

L'article 23 de la Charte, si important pour nous, a été interprété en Ontario comme s'il nous donnait le droit de gérer nos affaires scolaires. Cependant, dans la pratique et d'après la Loi sur l'éducation, les Franco-Ontariens n'ont même pas la garantie de contrôler leurs conseils d'éducation de langue française. En fait, ces conseils français pourraient être gérés par des Canadiens anglais. Et comment cela peut-il se faire?

Because here in Ontario—and it is probably the only definition of a French-speaking person in legal text anywhere—we have defined a French-speaking person. You see, section 258 of the Education Act defines a French-speaking person in these terms, “French-speaking person means a child of a person...” and it goes on. As a consequence, the unilingual anglophone parent of the children so defined moving here from Montreal because he was forced to send his children to a French school, is clearly a French-speaking ratepayer. As another consequence, and one which appears to be contrary to common sense as I have spoken to you mainly in French today, this definition may exclude me, except, of course, in the broadest sense, we are all children of somebody.

Il y a vraiment deux points que nous voulons souligner ici. D'abord, nous trouvons la définition d'un francophone des plus bizarre et, par conséquent, nous risquons de perdre le contrôle de nos conseils français d'éducation. Is this the status quo that we want to protect?

Si inadéquat qu'il soit, le fameux statu quo n'est même pas protégé, puisque dans la pratique, comme vous le savez tous, l'application de principes énoncés par la constitution dépend de la bonne volonté des gouvernements.

La situation que nous vivons à Penetanguishene avec l'école LeCaron le démontre bien. En juillet 1986, plus de quatre ans après l'entrée en vigueur de l'article 23 et de la Charte, la Cour suprême de l'Ontario a ordonné la construction de nouvelles installations scolaires à Penetanguishene, afin que nos enfants puissent bénéficier du plein exercice de leurs droits. On aurait pu croire que la province, comme bonne défenderesse de nos droits, procéderait sans plus tarder à exécuter le jugement, elle qui s'engage dans ce

nouvel accord à défendre les droits acquis par la Charte. Mais non, la province a d'abord fait appel de ce jugement pour ensuite retirer cet appel. Plus tard, il a fallu retourner devant les tribunaux, en octobre 1987, pour clarifier l'ordonnance.

Vous pensez peut-être que l'histoire finit là, mais détrompez-vous: Il faut y retourner en janvier 1988, et jeudi de la semaine dernière, le ministre de l'Éducation (M. Ward) annonçait que le gouvernement interjetait appel dans cette cause. Le résultat de toutes ces manoeuvres, c'est que six ans après l'entrée en vigueur de la Charte, pas une seule brique n'a encore été posée. Encore une fois, nous nous trouvons hors la loi.

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Je pourrais énumérer un grand nombre d'exemples, tous aussi bizarres les uns que les autres, mais je ne crois pas que ce soit nécessaire. Mais si c'est ainsi que l'on traite la minorité d'un des deux peuples de langue officielle, et cela dans une matière protégée spécifiquement par la Charte, comment va-t-on traiter les autres groupes moins bien protégés? Il me semble, même si on se garde bien de le dire, qu'on se dirige inexorablement vers deux «melting-pots». En Ontario, les faiblesses de l'accord du lac Meech pourraient être en grande partie compensées par des engagements fermes du gouvernement à faire la promotion du français à l'échelle de la province.

L'Ontario s'est déjà engagé dans cette voie avec l'adoption de la Loi sur les services en français. La province doit maintenant annoncer clairement ses couleurs et proclamer ouvertement son intention de promouvoir chez elle la culture française. Elle peut le faire aujourd'hui même, en termes bien clairs. Il lui suffit de se déclarer officiellement bilingue et, ce faisant, de faire enchâsser nos droits dans la constitution. Cela ne viendrait que confirmer et consacrer pour l'avenir le processus dans lequel la province est engagée depuis plusieurs années. Ce geste signifierait que l'Ontario se rallie définitivement au principe de la dualité canadienne qui est à la base de notre pays et qui déborde les frontières du Québec. Il signifierait aussi que la province continue d'exercer son leadership au Canada dans le traitement de sa population de langue française.

L'Ontario a invité ses citoyens à exprimer devant ce comité leur position sur l'entente constitutionnelle de 1987. Par ailleurs, notre premier ministre, M. Peterson, se dit tout à fait réfractaire à l'idée d'exiger quelque changement

que ce soit au contenu de l'entente. Nous direz-vous que l'adhésion du Québec est plus importante pour notre gouvernement que l'inclusion de la garantie constitutionnelle de droits équivalents pour ces deux communautés de langue officielle? Ou bien encore, que les plus petits sont appelés à payer pour les plus gros? Selon la formule proposée, c'est nous, le demi-million de Franco-Ontariens, qui paierions cher les frais de l'adhésion du Québec à la constitution. Déjà hors Québec, quelle sera notre place dans cette nouvelle vision de notre pays? Deviendrons-nous en plus hors Canada?

Qu'on ne se méprenne pas. Nous n'avons aucunement l'intention de nous rendre. Nous sommes décidés à survivre et à participer, dans notre langue et dans notre culture, au Canada du XXI<sup>e</sup> siècle. Nous le ferons avec vous, avec ou sans l'appui du Québec, de qui, à la suite des propos du ministre Rémillard, nous escomptions une meilleure utilisation de sa position de force dans les négociations qui ont conduit à l'entente de juin. Avec vous, nous le ferons chez nous en Ontario, où la reconnaissance officielle du français doit se faire dès maintenant et où, enfin, nous ne serons plus des hors-la-loi.

En dernier lieu, je voudrais répondre à ceux qui nous demandent ce que ça nous donnerait si l'accord du lac Meech était rejeté. Je vois plusieurs réponses à cette question. Si la volonté politique d'aujourd'hui veut consacrer le concept de deux Canada, il nous semble évident qu'il sera à peu près impossible de renverser cette nouvelle vision dans l'avenir, d'abord parce qu'elle sera ancrée dans nos lois et coutumes et ensuite parce que, pour le faire, il faudra l'accord de onze parties.

Comme j'ai tenté de le montrer tout au long de mon allocution aujourd'hui, la question pourrait plutôt être: Pourquoi appuyer un accord qui sanctionnerait des situations comme celles que je viens de vous décrire? J'irais même jusqu'à poser la question suivante à ceux-là: Puisqu'ils reconnaissent que cet accord n'est pas parfait, pourquoi faudrait-il engager notre futur dans une vision fautive, et cela par un compromis politique néfaste pour tant de Canadiens et de Canadiennes?

Je vous remercie, Monsieur le Président.

**M. le Président:** Merci, Monsieur Marchand. Vous avez présenté vos points de vue d'une façon très franche et nous aurons sans doute plusieurs questions.

**M. Morin:** On a eu la visite du professeur Beaudoin il y a quelques semaines, et puis il nous déclarait à ce moment-là que les Canadiens



français hors Québec devraient se réjouir parce que toutes les provinces avaient ni plus ni moins qu'accepté de préserver dans l'entente la dualité fondamentale du Canada. Il soulignait aussi avec emphase que le mot «fondamental» était réellement une victoire pour les minorités francophones hors Québec. Pourriez-vous commenter cela?

**M. Marchand:** Je sais qu'il y a eu aussi d'autres experts-juristes devant ce comité qui ont été un peu moins enthousiastes, et puis j'ai dit au tout début que nous aussi, nous avions reçu des avis juridiques qui, en résumé, disaient que nous ne perdons rien dans ce nouvel accord et que nous ne gagnons rien. C'est là la base de ce que j'essayais de vous dire cet après-midi. Cela confirme, ça sanctionne un statu quo, et pour nous ici en Ontario, et je crois pour les francophones hors Québec d'une façon générale, c'est complètement insuffisant. Je vous en ai donné certains exemples pour illustrer ça.

C'est vraiment là qui est le danger pour nous: C'est de sanctifier un statu quo qui deviendra presque impossible à modifier dans l'avenir, et ce statu quo conduit, de notre point de vue, inexorablement vers un Canada anglais et un Canada français. Je comprends que certaines personnes ne soient pas d'accord avec cette vision et j'invite ces personnes-là à vivre une situation minoritaire pour se rendre compte qu'il y a peut-être lieu de s'alarmer un peu.

**M. Morin:** C'est tout pour l'instant.

**M. Allen:** C'est un grand plaisir d'avoir les représentants de l'ACFO parmi nous cet après-midi pour nous donner leur point de vue à l'égard de l'accord du lac Meech.

C'est vrai, il y a un problème particulier auquel il est nécessaire de faire face en ce qui concerne les minorités franco-ontariennes sous cette entente. Pour ce qui a trait à la situation à Penetanguishene, vous avez le jugement de la Cour d'appel à l'égard de l'égalité des services éducatifs pour les Franco-Ontariens, mais je pense que c'est toujours un problème d'avoir le gouvernement payer de telles décisions.

J'ai une petite question. Vous avez souligné la différence entre les paragraphes 2(2) et 2(3) de l'accord, où on donne au Parlement du Canada et aux Législatures des provinces le rôle de protéger les caractéristiques fondamentales du Canada — c'est ce que disent ces paragraphes-là — et le paragraphe 2(3), selon lequel «La Législature et le gouvernement du Québec ont le rôle de protéger et de promouvoir le caractère distinct du Québec visé à l'alinéa (1)b)». Est-ce qu'il y aura un problème, à votre avis, si on ajoutait au libellé

du paragraphe 2(2) le rôle de promotion pour mettre l'emphase sur le caractère distinct, par exemple, de l'Ontario, qui est principalement anglophone? Oui? Donc, si on donne à l'Ontario le pouvoir d'augmenter son caractère distinct, est-ce qu'il serait possible que le résultat en soit une province plus anglophone? Est-ce qu'il y a un danger dans cette démarche? Ou avez-vous une autre opinion à l'égard de cette possibilité?

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**M. Marchand:** Je ne suis pas certain que je saisisse entièrement la teneur de votre question. Si j'ai bien compris, vous me dites: Si l'Ontario promouvait sa propre spécificité, est-ce qu'il y aurait là un danger pour les Franco-Ontariens? Si vous le faites en parallèle avec la spécificité du Québec et si vous dites que notre première raison d'être spécifiques ou distincts, ou peu importe le terme que nous employons, est celle de la langue et si nous faisons la promotion de cette spécificité en Ontario, ça voudrait dire, évidemment, promouvoir l'Ontario unilingue anglais, et évidemment nous regretterions beaucoup un tel geste.

**M. Allen:** Donc, est-ce que l'amendement que vous voulez y apporter est un amendement pour augmenter la dualité de l'Ontario et les pouvoirs de la minorité franco-ontarienne spécifiquement dans la constitution à l'égard des droits dans le contexte du dualisme ici en Ontario? Est-ce un tel amendement que vous voulez?

**M. Marchand:** Oui, nous voudrions que les francophones de l'Ontario, les francophones à l'extérieur du Québec, soient reconnus comme une communauté linguistique et non pas comme des parlants français. Qu'est-ce qu'un parlant français? Je vous ai suggéré que l'article 257 de la Loi sur l'éducation définit un francophone en Ontario, avec les conséquences néfastes pour nous que j'ai illustrées. C'est là qu'est le danger pour nous de parler simplement de personnes hors Québec parlant français et non pas de parler d'une communauté francophone qui aurait des droits collectifs comme communauté.

**M. Allen:** Oui, il est très important de souligner le statut des communautés en ce qui concerne les droits culturels, principalement.

**M. le Président:** Monsieur Allen, est-ce que je peux ajouter quelque chose dans le même sens? En effet, si je comprends bien, le problème que vous avez avec l'accord du lac Meech, c'est le concept d'une société distincte, parce que vous vous demandez comme Franco-Ontariens: «Où se trouvent les Franco-Ontariens à l'intérieur de

l'accord?» En effet, selon l'accord, vous n'y êtes pas.

Jusqu'ici, nous avons parlé avec d'autres personnes, d'autres groupes, par exemple, de certains droits – de la Charte, des droits des femmes, des groupes multiculturels ou des Amérindiens. Mais ici, et je veux savoir exactement ce qu'il en est, ce que vous préféreriez, c'est une sorte de reconnaissance des droits communautaires. Il y aurait donc au Canada certains droits pour les communautés francophones, peu importe les endroits où elles se trouvaient – au Québec, en Ontario, en Saskatchewan, au Nouveau-Brunswick. Alors, si je vous comprends bien, il y a vraiment un problème fondamental, d'après vous, avec l'accord du lac Meech. Il ne s'agit pas d'apporter des amendements. C'est plutôt que vous avez vraiment beaucoup de difficulté à accepter cette idée d'une société distincte parce que pour vous ça veut dire que vous êtes de côté, hors la loi.

**Mr. Marchand:** In no-man's land.

**M. le Président:** «In no-man's land», oui. Est-ce que j'ai bien compris ce que vous m'avez dit?

**M. Marchand:** Je pense que oui. C'est exactement une des modifications majeures que nous voudrions faire apporter à l'accord du lac Meech, qui reconnaîtrait les francophones hors Québec comme communauté et protégerait leurs droits comme droits communautaires. Nous aimerions aussi que les provinces et le gouvernement fédéral fassent plus que simplement protéger ce qui existe, mais qu'ils fassent la promotion de cette dualité culturelle.

**M. le Président:** OK, mais comment est-ce qu'on peut faire ça à l'intérieur de l'accord qui existe? Pensez-vous qu'on puisse garder la reconnaissance d'une société distincte, mais qu'on puisse y ajouter aussi peut-être un quatrième ou un cinquième point sur les communautés minoritaires, soit anglophones ou francophones? Qu'est-ce que vous nous suggérez pour reconnaître cette idée?

**M. Marchand:** Je ne peux vraiment pas répondre à cette question-là précisément, n'étant pas juriste. Je crois que ce que vous dites reflète nos pensées et je présume qu'il y a des juristes qui pourraient faire des modifications aux termes qui garantiraient justement ces choses-là. Quant aux termes précis, Monsieur le Président, je m'excuse de ne pas être compétent comme juriste.

**M. Gilbert:** Ce que j'aimerais ajouter là-dessus, c'est que l'accord actuel reconnaît des

individus, la coexistence d'individus, et chaque fois qu'on a reconnu à des individus le droit de vivre, ça ne voulait pas dire qu'on leur a reconnu un droit à des conditions pour s'épanouir. Et c'est là que le concept de communauté devient très important. Comme n'importe quelle communauté, vous allez dire dans une école: «Il nous faut une ambiance, un environnement». La Charte actuellement, en parlant de la coexistence d'individus d'expression française ou d'expression anglaise, tait cette réalité de communauté ou de conditions pour que ces individus d'expression ou anglaise ou française puissent s'épanouir et vivre raisonnablement dans ce pays.

**M. le Président:** Je vous comprends.

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**M. Allen:** J'ai l'impression que vous avez un problème avec l'alinéa 2(1)a sur la reconnaissance de l'existence de Canadiens d'expression française. C'est une expression qui fait référence aux individus mais pas aux communautés. C'est un problème, vraiment, mais c'est le langage de toute la Charte des droits et libertés. C'est une charte qui souligne les droits individuels mais pas si fortement les droits communautaires. C'est un problème, vraiment, d'après moi.

Néanmoins, dans le paragraphe 2(2), selon lequel le Parlement du Canada et les Législatures ont le pouvoir de protéger les caractéristiques fondamentales du Canada, etc., dans ce paragraphe, selon votre opinion, quel est le statut du jugement de la Cour d'appel en 1984 à l'égard des droits à l'éducation égaux pour les Franco-Ontariens? Est-ce que la protection accordée par un tel jugement a vraiment la capacité de promouvoir les droits des Franco-Ontariens? Comprenez-vous ma question?

**M. Marchand:** Je crois la saisir un peu, et ma réponse est que, évidemment, en dernière instance, il y a toujours recours aux tribunaux. Maintenant, c'est vraiment aux législateurs, je crois, d'avoir des lois qui reflètent l'esprit et les droits fondamentaux et qui voient à ce qu'ils soient appliqués. C'est ça qui va fonctionner en pratique. Je ne sais pas si je réponds précisément à votre question.

**M. Allen:** Oui, merci.

**M. Morin:** J'ai l'impression que quand vous faites l'interprétation du mot «préservé», ça veut dire tout simplement: préserver, c'est conserver – pas de progression, ça reste mort. Si, par exemple, je prends le cas de la province de l'Ontario, on peut voir que depuis quelques années il y a des progrès énormes. Je regarde même ce qu'on fait maintenant. Converser et



discuter en français, ça ne se faisait pas auparavant; le système de traduction simultanée, ça n'existait pas auparavant; des débats en français, ça n'existait pas auparavant. J'occupais le fauteuil au moment où la Loi 8 a été adoptée. On a eu des débats; même M. Breagh a été impliqué là-dedans. Tout le monde lui prêtait main-forte pour que ça passe.

À mon point de vue — je ne sais pas, j'aimerais écouter votre opinion — le mot «préserver» veut dire tout simplement: s'assurer que ça va continuer à progresser. Est-ce que c'est ça, votre interprétation du mot «préserver»? Ou est-ce qu'il est peut-être seulement question de changer de mot et de dire que les droits seront plus élaborés ou seront ancrés?

**M. Marchand:** Il est toujours difficile d'essayer d'interpréter un mot vis-à-vis d'un autre. Je suppose que, dans le fond, nous disons... M. Allen faisait référence à l'interprétation de la Cour d'appel en 1984, qui dit d'abord que l'article 23 devrait remédier à des choses. Et puis nous avons des études en Ontario qui disent que pour remédier à la situation des francophones en Ontario, il faut prendre des mesures «affirmatives». Il faut aller plus loin que de donner simplement le minimum, il faut aller plus loin que de dire simplement: «Bien, forcez-nous et puis vous aurez peut-être quelque chose». Je pense qu'au cœur de tout ça, indépendamment des mots — que ce soit «préserver» — c'est là que nous mettons l'emphase peut-être, sur le mot «promouvoir», nous autres. Préserver une chose qui nous assimile, comme vous le savez tous, à grande vitesse, que vous appeliez ça... C'est vrai qu'il y a eu des progrès en Ontario; nous en sommes reconnaissants et nous reconnaissons ce fait. Maintenant, je pense qu'on dit qu'il faut aller plus loin que ça aussi et les enchâsser, ces droits-là.

**M. Morin:** Est-ce que vous voyez le même problème se produire, par exemple, chez nos amis, les Québécois anglophones?

**M. Marchand:** Évidemment moi, je ne peux pas parler pour nos amis anglophones québécois. Je suppose toutefois que si nous étions une minorité ici en Ontario mais une partie d'une majorité de 250 millions sur le continent nord-américain, nous pourrions vivre dans une situation sans toutes les protections constitutionnelles que nous demandons. Mais évidemment, ce n'est pas le cas. Je crois que ce n'est pas un bon parallèle que de prendre la situation des anglophones minoritaires au Québec et de l'interposer en Ontario.

J'aimerais ajouter que presque tout ce que nous revendiquons en Ontario, en somme, au point de vue de droits communautaires et d'institutions francophones, nos voisins, dans la province immédiatement à l'est, les ont. Ils ont le plein contrôle de leurs institutions scolaires, ils ont le plein contrôle de leur conseils scolaires, ils ont des institutions postsecondaires, ils ont des universités, ils ont des hôpitaux, ils ont des services communautaires dans leur langue. Ce n'est pas la langue anglaise au Québec qui est vraiment menacée. Je n'aimerais pas me rendre le porte-parole des anglophones du Québec, mais je ne crois pas que notre situation soit le duplicata de la situation des anglophones du Québec. Il y a beaucoup d'entre nous, peut-être, qui aimerions avoir les mêmes institutions qu'ont les anglophones québécois.

**M. Gilbert:** Si vous me permettez, j'aimerais faire une petite analogie entre les mots «préservation» et «promotion». Actuellement, il y a les Jeux olympiques à Calgary et on n'a jamais parlé de la préservation des Jeux olympiques ou des sports, on parle toujours de promotion. «Promotion» a une notion de développement, tandis que «préservation», c'est comme dans un musée, où on essaie de préserver des biens, une culture, etc. Je n'ai jamais entendu dire qu'un promoteur de boxe, c'est un préservateur de boxe. Alors, je pense que dans le fait ou dans l'utilisation quotidienne, même entre ces deux mots-là, je pense que tout le monde saisit le fait qu'il y a une différence énorme, que «préservation» n'implique pas les notions de développement et d'épanouissement.

**M. le Président:** Merci. Jusqu'ici, l'ACFO a parlé avec les Acadiens et les autres groupements minoritaires dans une sorte de front commun sur ces questions. Ce que vous nous dites aujourd'hui, est-ce qu'on peut dire que ça représente aussi le point de vue des Acadiens, par exemple?

**M. Gilbert:** Plus ou moins.

**M. Marchand:** L'ACFO, comme vous le savez, est une des composantes de la Fédération des francophones hors Québec, et la réponse à votre question est oui, la position de la FFHQ est analogue à la nôtre pour ce qui est de l'accord du lac Meech, et la FFHQ fait les mêmes revendications, si vous voulez.

**1620**

**M. le Président:** Avez-vous parlé avec le gouvernement fédéral au sujet de ces revendications?

**M. Marchand:** Au niveau de la FFHQ, assurément, oui.

**M. le Président:** Qu'est-ce qu'on vous a répondu?

**M. Marchand:** Spécifiquement, qu'il est très difficile en ce moment de penser à des modifications à l'accord du lac Meech.

**M. le Président:** OK. En avez-vous parlé avec les représentants du gouvernement du Québec?

**M. Marchand:** Le premier ministre du Québec a rencontré les représentants de la FFFHQ à Moncton, je crois, en octobre ou novembre — je n'y étais pas — et, que je sache, il a suggéré que dans un deuxième lieu, on puisse revenir et essayer de régler les problèmes des francophones hors Québec, des minorités linguistiques.

**M. le Président:** Est-ce que ça vous donne confiance?

**M. Marchand:** Non.

**M. le Président:** Je pense que c'est vraiment un point extrêmement important dans le développement constitutionnel de notre pays, en ce sens que dans le passé il y avait beaucoup de Québécois — l'Union nationale, les libéraux — qui ont toujours dit: «Bon. Vous, anglophones dans le reste du Canada, vous allez toujours nous dire que nous devons protéger les minorités hors Québec, c'est notre rôle». Alors ici, nous avons la société distincte, qui donne quelque chose au Québec. On n'est pas exactement certain de ce que ça donne, mais ça lui donne quelque chose. Et vous, en étant francophones hors Québec, vous avez la forte impression que vous avez vraiment perdu quelque chose.

**M. Marchand:** Nous avons l'impression que depuis, disons, dix ou douze ans il y a une vision au Canada qui dirige le Canada vers un pays où on reconnaîtrait formellement l'existence de deux peuples linguistiques différents; et avec l'accord du lac Meech, nous prévoyons peut-être que la vision va changer, que tout à coup nous avons une province française qui se dit unique et distincte des autres. Là, nous disons: «Bon. Les autres sont quoi? Ils sont semblables de par leur langue». Et puis c'est là que nous voyons une division sur une base linguistique qui, pour nous, pose un danger sérieux, et sans la promotion et, d'abord, la reconnaissance que notre communauté existe et devrait être promue, nous avons de sérieuses réserves quant à notre avenir.

**M. le Président:** Mais à mon sens, il y a peut-être un problème de base aussi avec la position du gouvernement du Québec, que ce soit le gouvernement Bourassa ou un autre — non pas un gouvernement séparatiste, mais un autre parti peut-être nationaliste mais fédéraliste.

Je ne sais pas s'il serait possible d'en arriver à une sorte de compromis entre ces positions, car j'ai l'impression que le Québec veut vraiment — on en a parlé très souvent — mettre la société distincte dans la constitution. L'accord du lac Meech va le faire. Alors, je cherche le moyen de garder la société distincte, ce que le Québec veut garder, et en même temps de donner quelque chose aux minorités, que ce soit aux anglophones au Québec ou aux francophones hors Québec: un statut quelconque, un statut communautaire peut-être, qui protège et promeuve leur épanouissement, leur avenir. Mais je pense que ça sera très difficile à faire à l'intérieur de l'accord du lac Meech et c'est pourquoi, d'après moi, votre présentation attaque directement le fond du lac Meech, plus que n'importe quelle autre présentation jusqu'ici devant notre comité. Je veux bien comprendre ce que vous venez de nous dire.

**M. Marchand:** Vous semblez l'avoir compris parfaitement.

**M. le Président:** Bon.

**M. Morin:** Croyez-vous qu'il devrait y avoir — parce que ce qui est important, c'est que le Québec se joigne à l'entente, et les Québécois s'y sont joints — une espèce de porte, une espèce d'ouverture qui devrait exister pour dire que plus tard nous allons revenir et rediscuter cette question que vous avez apportée, la question de préserver, de changer de terme — autrement dit, à la deuxième ronde? La première ronde, c'est d'amener le Québec avec tout le reste. À la deuxième ronde: «Il y a des problèmes, ce n'est pas parfait. Revenons et rediscutons.»

**M. Marchand:** Je l'ai posée, cette question-là, à l'intérieur de mon texte, d'une façon indirecte peut-être, en disant: Est-ce que l'adhésion du Québec est vraiment plus importante pour notre gouvernement que la reconnaissance des droits fondamentaux, des reconnaissances plus formelles de nos droits fondamentaux comme communauté minoritaire, minorité linguistique?

**M. Morin:** Est-ce qu'on pourrait dire aussi que c'est un début à des discussions futures?

**M. Marchand:** Je suppose qu'on peut toujours croire qu'il y aura un demain. Cela fait 200 ans que moi et mes ancêtres y croyons. Maintenant, la difficulté est là. On dit que c'est difficile aujourd'hui. Moi, je me demande pourquoi ce serait plus facile de le faire dans l'avenir, une fois que ce sera ancré dans nos coutumes, dans nos lois, d'autant plus qu'à ce moment-là, ça prendra l'accord de onze participants. Alors, si c'est si difficile aujourd'hui, je



ne vois pas pourquoi ce sera plus facile dans une deuxième ronde. Et quand? Je crois tout de même qu'il y a déjà une deuxième ronde de prévue pour d'autres matières.

**M. Morin:** N'y a-t-il pas un danger, Monsieur Marchand, que si l'entente n'est pas ratifiée, le Québec revienne et puis dise: «Bon. On vous l'avait dit. Ils ne veulent pas l'avoir.»

**M. Marchand:** Alors, c'est la situation d'être entre un roc bien dur et un poêle bien chaud. Quelles en seront les conséquences si l'accord n'est pas ratifié? Elles seront peut-être désastreuses. Moi, j'essaie de vous dire que si l'accord est ratifié tel quel, pour nous elles seront désastreuses.

Alors, vous allez me dire: «Est-ce que c'est moins désastreux pour moi si le Québec ne s'y joint pas que si le Québec s'y joint et crée et sanctionne les situations telles que je les ai décrites?» C'est un dilemme; j'ai dit au tout début que j'étais ici pour discuter du dilemme bien profond qui risque vraiment notre assimilation. Je crois que nous n'avons pas 20 ans, là, pour ça. Si les instances politiques aujourd'hui nous disaient, «Ne vous inquiétez pas; dans 18 mois, voici ce que nous allons faire», et que ça répondait à ces choses-là, peut-être qu'il y aurait lieu d'espérer. Mais je ne pense qu'il y ait personne aujourd'hui qui soit en mesure de faire de tels engagements.

1630

**M. Gilbert:** D'ailleurs, on a un exemple de cela à Ottawa, actuellement. Le gouvernement vient de retirer, dit-il, temporairement en deuxième lecture la loi C-72 sur les langues officielles et qui, de l'aveu même de nos représentants à Ottawa, nous disait que ça allait venir compléter, renforcer les droits, entre autres, des minorités. Bon. Tout le monde sait ce qui est en train d'arriver. Alors, c'est inquiétant pour nous et je pense que c'est actuel. Que va-t-il arriver de cela? Si une poignée d'individus réussit à réinterroger, disons, à faire qu'un gouvernement tente de clarifier encore sa position dans l'évolution ou dans l'avancement des travaux sur une loi aussi importante pour nous et la retire ensuite, que va-t-il nous arriver?

**M. Allen:** Vous avez raison de dire que la différence entre les mots dans les paragraphes 2(2) et 2(3) signifie une grande différence pour la préservation d'une minorité en Ontario et la promotion d'une autre minorité anglophone au Québec. Est-ce que les premiers ministres ont construit assez d'articles si différents avec différents mots? Est-ce qu'il y a un objectif,

est-ce qu'il est nécessaire de soupçonner un peu les raisons d'État ou quelque considération importante pour nous?

**M. Marchand:** Ce serait loin de l'esprit de l'ACFO de soupçonner les motivations qui n'étaient pas exprimées. Non, je pense que, comme je le disais tantôt, les difficultés sont énormes maintenant. Elles ne le seront pas moins non plus, à notre point de vue, dans un avenir indéterminé.

**M. Morin:** Avez-vous eu des consultations avant la rencontre des premiers ministres? Avez-vous rencontré certains groupes pour discuter de ce qui allait se passer? Vous a-t-on consultés?

**M. Gilbert:** Avant la rédaction de ce nouveau texte?

**M. Morin:** Oui, le lac Meech.

**M. Gilbert:** Cela fait quand même beaucoup de collègues ici dans la communauté qui sont impliqués et, à ma connaissance, il n'y a pas eu...

**M. Morin:** Avec des gens du Québec? avec des gens du Nouveau-Brunswick? avec d'autres? Aucun?

**M. Gilbert:** Du gouvernement?

**M. Morin:** Oui.

**M. Gilbert:** Venir chercher des opinions?

**M. Morin:** C'est ça.

**M. Gilbert:** Pas à ma connaissance. Nous avions quand même fait parvenir, par l'intermédiaire de la FFHQ, un certain nombre de...

**M. Morin:** De mises en garde?

**M. Gilbert:** Oui, de zones sensibles qu'il serait souhaitable de corriger, mais...

**M. le Président:** Mais entre le 30 avril et le 3 juin, est-ce que vous ou la Fédération avez essayé de parler soit avec le gouvernement fédéral ou avec les gouvernements de l'Ontario ou du Nouveau-Brunswick au sujet de ces mêmes ennuis?

**M. Gilbert:** Par l'intermédiaire de la FFHQ, il y a eu quelques rencontres, des contacts avec des hauts fonctionnaires, et je crois même avec des ministres et des politiciens du fédéral.

**M. le Président:** Qu'est-ce qu'on vous a dit?

**M. Gilbert:** Il est difficile à ce moment-ci de vous dire exactement ce qui a été dit, car ce sont deux textes différents, celui du lac Meech et celui du mois de juin. C'est-à-dire que le lac Meech nous en donnait plus, parce qu'il parlait de communautés, il y avait cette reconnaissance; et au mois de juin, soudainement, cette reconnais-

sance n'y est plus. Donc, c'était vraiment beaucoup plus satisfaisant, l'entente du mois d'avril au lac Meech, que la deuxième entente du mois de juin au bloc Langevin.

**M. Allen:** Vraiment, c'est notre jour pour les hors-la-loi.

**M. le Président:** Oui, c'est ça.

**M. Allen:** Je me demande si tous ces hors-la-loi font front commun en ce moment contre l'accord du lac Meech. Notre Président vous a demandé si vous étiez d'accord avec les Acadiens, par exemple. Est-ce qu'il y a des discussions avec les autres hors-la-loi, comme les groupes dans les territoires, etc., pour faire front commun contre l'accord?

**M. Gilbert:** Pour ce qui est de la Fédération des francophones hors Québec, les présidents se sont rencontrés, en ont discuté et se sont tombés d'accord, ce que M. Marchand vous a souligné tout à l'heure, que la position qui vous a été présentée reflète l'état d'esprit des communautés

francophones à l'extérieur du Québec. D'un océan à l'autre, nous sommes très inquiets.

**M. le Président:** Je voudrais vous remercier infiniment. Votre présentation était très claire, très franche. Vous nous avez donné des questions et des idées bien originales sur l'accord, idées que nous n'avions pas entendues avant aujourd'hui. Je pense surtout à l'aspect des communautés minoritaires hors Québec. Nous allons certainement étudier votre mémoire à fond d'ici la présentation de notre rapport. Mais au nom de mes collègues, j'aimerais vous remercier infiniment pour le temps que vous avez pris pour rédiger et présenter vos commentaires cet après-midi. Merci beaucoup.

**M. Marchand:** Nous vous remercions aussi, Monsieur le Président.

**Mr. Chairman:** The committee will stand adjourned until tomorrow morning at 10 o'clock here.

The committee adjourned at 4:36 p.m.



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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Chairman:** Beer, Charles (York North L)**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

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Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Substitution:**

Sterling, Norman W. (Carleton PC) for Mr. Harris

**Clerk:** Deller, Deborah**Staff:**

Bedford, David, Research Officer, Legislative Research Service

Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:****From the Legislative Assembly of the Northwest Territories:**Kakfwi, Hon. Stephen, Minister of Aboriginal Rights and Constitutional Development;  
MLA for SahtuRichard, Ted, MLA for Yellowknife North  
Affairs**From the Legislative Assembly of the Yukon:**

Penikett, Hon. Tony, Government Leader; MLA for Whitehorse West

**De l'Association canadienne-française de l'Ontario:**

Marchand, Jacques, président

Gilbert, Fernand, directeur général









No. C-5

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### Select Committee on Constitutional Reform

1987 Constitutional Accord



**First Session, 34th Parliament**

Wednesday, February 17, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Wednesday, February 17, 1988**

The committee met at 10:07 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** I would like to welcome everyone to the next session of the committee. I would like to invite representatives of the Social Planning Council of Metropolitan Toronto to come forward and sit along the front.

We have with us this morning Jeffrey Patterson, senior program director, Stuart Coles, elected vice-president, board of directors, and Jodie Orr, the executive director of the social planning council. I think the best thing at this point is if I just turn the microphone over to you, and please proceed in whatever fashion you would like to proceed. After your remarks, we would like to have an opportunity for some questions, if we could.

### SOCIAL PLANNING COUNCIL OF METROPOLITAN TORONTO

**Mr. Coles:** My name is Stuart Coles. Jodie Orr is on my right and Jeffrey Patterson on my left. They are here to answer the questions. I am here to introduce the document, which is distilled, really, out of years of struggle and reflection by the social planning council on how social policy retains a strong role in the formation of national policy, because the cities do not have much independence in this area. Though our warrant is a Metro-wide warrant, we have to struggle with negotiations between federal and provincial authorities or our own case is lost in terms of what is good for the people and the communities making up Metro Toronto.

First, some pink pages which give you a page and a half or so of credentials for the council and outline some of its major activities, some of its major investments in years gone by and in recent times on the questions that are in many ways concentrated into the question of constitutional reform which is before your committee.

Perhaps just to mention two components in those pink paragraphs, one has to do with research and information, in which the council has quite a notable record. You will see some of the instances of that work in the first indented paragraph on the first of the pink pages. That is followed by the other side of our work, which has

to do with what you do with information and analysis. You will see a roster of groups at the bottom of pink page 1, where the social planning council teams up with other energies and other concerns in the community to try to implement the information and analysis that have been put together.

If you turn past the pink pages, you will see a table of contents. This perhaps gives you a quick sense of the makeup of our document. There is an introduction and recommendation, which I will read. Then there are other sections following on the Meech Lake accord and the national objectives and their being face to face with Canadian social policy and programs. Then there is some comment on section 106A and a conclusion, which we would like to make sure we get to.

May I take you then to page 1, introduction. Starting about the middle of that paragraph at the top of the page, the Meech Lake accord potentially alters fundamentally the future nature of Canadian social programs and the meaning of Canadian citizenship. That is really what caused us to ask for some of your time in this committee.

You see there a citation from section 106A: "The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with national objectives."

Much of our brief really is asking concentrated attention to that paragraph from the accord.

Immediately following confirmation of the Meech Lake accord, the social planning council wrote to the Premier of Ontario and the Prime Minister of Canada expressing our concern that this agreement potentially results in a balkanization of social programs across Canada to such an extent as to alter the essence of Canadian citizenship.

Premier Peterson replied to that letter from us and you will see the substance of his reply there. I think I would like to just go to about lines 5 and 6 on page 2, where he makes a very notable reference to "...making constitutional amendments both difficult and in some cases impossi-



ble." I guess, at variance with Premier Peterson's statement, the council does not see that the accord makes that matter better but makes it worse. We have two or three special dimensions to that concern, such as what it means for women and what it means for native people.

While this council certainly agrees with the value that the Premier cites of bringing Quebec, which essentially represents one of Canada's founding peoples, into the constitutional fold, we are not as confident that the level of co-operation required to ensure a level of continuity in social programs compatible with a sense of common Canadian citizenship will be forthcoming without changes in the wording of section 106A.

If interpreted too broadly, or if national objectives for a particular program are not well enough developed, any provincial activity might qualify for compensation. A province might claim funds for child care, for example, and use them to support kindergarten programs; or funds intended solely for child day care provided by nonprofit operators might be used for care provided by commercial operators.

Some of these possibilities were identified in a public forum sponsored by our council in October of last year. Professor Al Johnson of the University of Toronto department of political science, former president of the CBC and Deputy Minister of National Health and Welfare for Canada, indicated that he did not think Canada's current health insurance system could have been put in place under the terms of the Meech Lake accord.

Lise Corbeil-Vincent, co-ordinator of the Canadian Day Care Advocacy Association, said her organization was concerned that commercial day care centres might receive government assistance. National social policy columnist Leonard Shifrin indicated that the phrasing of section 106A was left purposefully vague to satisfy the demands of certain premiers other than the Premier of Quebec, who were in disagreement with the social policy sentiment prevalent across most of Canada and in the majority of provinces.

The potential outcomes of section 106A are not all negative. The establishment of national objectives could open up exciting possibilities for collaboration in meeting critical national objectives such as reduction in the number of Ontarians and Canadians living in poverty. Perhaps you know that number is a very terrifying reality in our national life.

Such a creative and national exercise would move away from narrow administrative criteria

and towards exciting objectives. I brought my two colleagues along to help you figure out what those exciting objectives might be. We now want you to notice the recommendation.

We accept the framework in which shared-cost programs in areas of exclusive provincial jurisdiction have been developed in the past. We are of the opinion that constitutional changes which would diminish the ability to reach federal-provincial consensus around social programs should be discouraged. Difficulties with respect to retaining the criteria that form the conditions for provinces to receive cost-sharing revenues for medicare programs demonstrate both the fragile nature of federal-provincial negotiations and the importance of retaining the ability of breaking an impasse should one occur.

These complex matters cannot be resolved quickly. Social programs in health, income security, income training, social services and education are on the verge of major reform and their standards and objectives require clear specification.

The Social Planning Council of Metropolitan Toronto therefore recommends that the spending power clause, section 106A, be identified for further clarification by the federal and provincial governments with participation by the nongovernment community that often delivers social programs in partnership with government.

This reservation need not delay the passing of the accord. Approval of the clause might be deferred for a period of time following proclamation of the accord and be subject to the ratification of an interpretive document.

On page 5, "Other Sections of the Meech Lake Accord," you will notice the second paragraph under that heading. It refers to women as somewhat underrepresented at the Meech Lake accord; therefore, a great concern of the council and many of its member agencies is that this matter needs to be remedied. The council alerts the select committee to ensure that the accord does not affect adversely the rights of women, minority groups and others protected by the Charter of Rights, otherwise one of the most significant accomplishments of the Constitution Act of 1982.

One of the most controversial areas of the accord is the suggestion that the linguistic duality/"distinct society" rule of interpretation included in the accord might be used to override particular charter rights. This question has been raised most extensively by groups representing women, but the concern applies as well to all

persons who rely upon the equality guarantees of section 15 of the charter.

There is a reference there to a Supreme Court case that we think is hard evidence for our concern in that matter.

If you turn to page 6, summarizing that concern are the last lines of that paragraph at the top of the page. We strongly affirm the notion that gender and other equality rights, where they exist in the charter, be treated as paramount in all situations. That is one of our fundamental concerns.

We also go on here to cite another group that happen to have a surprisingly large presence in Metro Toronto, but not often recognized, the native people.

The social planning council is also concerned that constitutional issues that directly affect aboriginal people deserve continued prominence until solutions are identified and implemented. We draw your committee's attention to the conclusions of the Report of the Special Joint Committee of the Senate and the House of Commons with respect to aboriginal rights.

Perhaps I can assume that you have those on record. If not, please note the five excerpts from that report that we think are to be dealt with very urgently. They should be taken into account in Ontario's response to the Meech Lake accord.

## 1020

I suggest that you go over to page 13 and see our conclusion. We urge the select committee to report the following:

1. That support for section 106A of the constitutional accord be reserved by the government of Ontario pending further clarification of its provisions. Such clarification might take the form of an interpretive document and this document could be concluded up to two years subsequent to the accord.

2. That the gender and other equality rights in section 15 of the charter take precedence over the linguistic duality/"distinct society" rule of interpretation.

3. That further meetings which attempt to resolve differences between federal and provincial governments and aboriginal peoples be scheduled prior to the coming into force of the constitutional accord.

That is a quick run through our submission and perhaps you have questions.

**Mr. Chairman:** Certainly, for the various parts that you were not able to touch on specifically, we of course have them on paper and will be able to review them. I will move then to questions.

**Mr. Breagh:** Three quick questions from me. In your first conclusion talking about section 106A, I read that basically that you understand that we do a lot of things on a shared-cost basis. We establish different standards and we do everything from building roads and arenas to providing social service programs and pension funds. All of that is pretty common ground in Canada.

I take it that what you are saying there is that you would like to see some of the fine print on this before you proceed. You are not rejecting the concept that is there but you would like to have a more specific principle established before you proceed along those lines.

**Mr. Coles:** Perhaps Jeffrey would like to respond to that.

**Mr. Patterson:** Only to say that, of course, section 106A refers only to programs in areas of exclusive provincial jurisdiction, which are almost always social programs. I think you will see, in the parts we did not get a chance to read in the time we were allotted today, that our concern is that terms such as "principles" which occur in the actual wording of the accord do not include what we consider enough.

**Mr. Breagh:** You want a better definition of that.

**Mr. Patterson:** We would like perhaps a more inclusive definition. What we suggest in those pages is that standards and objectives, and conditions as well, are things which could be included within that definition.

**Mr. Breagh:** Let me just pursue that a bit. You are not afraid of the idea, for example, that Ontario always has taken federal money that is given to the province specifically for some shared responsibility, put that through a general revenue fund and the reality may be—

**Mr. Patterson:** Not at all. We say we accept what has happened in the past.

**Mr. Breagh:** So that is no problem.

**Mr. Patterson:** We are worried about future changes that would limit what could be done in the future.

**Mr. Breagh:** The second point I wanted to pick up on with you is that many of us read this accord in different ways and that appears to be causing a problem. My reading of it is that there is nothing in this accord which removes any rights which you got, say in the charter, but that is not as clear as it ought be, and there are certainly a number of groups struggling with that notion. They appear, in other words, to have lost



some rights under this accord that they had just recently gained.

Would you, for example, be satisfied if we could design a reference of some kind to the Supreme Court which would clearly establish that the Charter of Rights takes precedence over this or that nothing in here removes any rights that have just been received by anyone.

**Mr. Patterson:** I think that is what we are asking.

**Mr. Coles:** Yes, it is part of our statement.

**Mr. Breaugh:** One final point: you have introduced an interesting concept here on a couple of occasions this morning and one that I find attractive, basically saying that this is all fine, if you, for example, resolve the differences between federal and provincial governments and aboriginal peoples, proceed; and if you do not, hold off for a bit. I find that an interesting concept.

There are those who might consider this to be tantamount to blackmail, which is probably why I find it very attractive, but it does kind of put out that there are a couple of things here that have to be resolved before you proceed with this. I just wondered how strictly you wanted that adhered to. Is that kind of a fervent plea that you cannot proceed with this? This committee, for example, has been told by the Premier that amendments would not be well received, and we may have to deal with that in a confrontational way later on, but for now we are very interested in looking at other ways in which we could solve some problems that people have with this that do not involve amendments.

One of the ways, frankly, would be to simply say in our report: "Listen, if you folks all want to get together and resolve the differences between aboriginal rights and the various provinces and the federal government, and you have a couple of years left to do it, if you want to resolve that one and get that put away prior to the accord being formalized, fine." There is considerable attraction there. Could you elaborate on that just a little bit?

**Mr. Patterson:** I think that is exactly what we intended, and your interpretation is exactly in the right light. What we are indicating here is not that we are opposed to a lot that is in the accord. Some of it, as you have indicated, simply requires clarification.

On something like aboriginal rights, we ourselves did not receive well the fact that the 11 first ministers seem to have concluded that the process with respect to aboriginal peoples and protection of their rights in the Constitution is

over with, having held several conferences and reached no conclusion. We were happy to see that the joint committee of the House of Commons and the Senate had recommended that at least one further conference involving the issue of aboriginal rights be scheduled prior to the coming into force of the Meech Lake accord.

This at least went one step further than the 11 first ministers had been willing to go. They are suggesting even more than that, of course, but with that as well as our suggestion, maybe section 106A, which concerns us so much, could be held in reserve for a further two years awaiting an interpretative document that would put right our concerns. That might be a way to proceed without actually amending or defeating the accord on the part of the government of Ontario.

**Mr. Cordiano:** Thank you for your presentation. I just want to quickly cover the three points you have made in conclusion here. Starting with the first, section 106A and the spending provisions, I understand what you are saying. Basically you are agreeing that the federal government's spending powers have now been clarified in areas of exclusive provincial jurisdiction, that it is an extension of federal jurisdiction which was not constitutionally recognized prior to this accord. Do you agree with me on that? Is that what you are leading to? In a sense we had exclusive provincial jurisdiction in those areas, and now it has been recognized as inherent in the Constitution and explicitly stated in section 106A that you have federal spending powers.

**Mr. Patterson:** Our concern is that that is not really an accomplishment of this accord, even though some people might think it is, because the spending powers in areas of exclusive provincial jurisdiction were confirmed by a Supreme Court of Canada decision and subsequently by the House of Lords, in 1936 and 1937. Section 36 of the Constitution Act also confirmed some of the federal spending powers in areas of exclusive provincial jurisdiction, and we do not think that was actually at issue.

In fact, there is some concern, although we have not expressed that, that the wording of the accord might limit future federal spending power in areas of exclusive provincial jurisdiction. Up to now, there were no limits on that federal spending power.

**Mr. Cordiano:** What in effect has taken place in practice is now being constitutionalized. We had a series of arrangements—in fact, we literally had wars during the 1960s and 1970s with regard to federal and provincial relations and areas of exclusive provincial jurisdiction. There was a

virtual war between the provincial and federal levels of government.

I think what is being attempted here is clarification. It may not satisfy your needs, but I am saying it at least attempts to recognize the fact constitutionally, because it is not recognized as far as I can see. Referring back to what some of the body of legal opinion has indicated to us, and referring to what Peter Hogg has said in his testimony and in the book he has written on the accord, he is simply suggesting that it was nowhere recognized prior to this that the federal government had any authority to spend in areas of exclusive provincial jurisdiction. This was not a fact. There may have been arrangements, but legally I think it was not recognized as far as the body of legal opinion we have had presented to us says.

1030

**Mr. Patterson:** I think you are right that it had never been recognized by the provinces; but it had been recognized nevertheless, because provinces had in the past challenged that right and lost their challenges.

**Mr. Cordiano:** I cannot refer to the specific cases because I think we will get into a series of long-winded debates on this. I am saying that we, as members of this committee trying to grapple with this question, had a body of opinion that suggested very clearly that, indeed, this is a new unprecedented move on the part of both levels of government to recognize something that simply was not there before. That is what has been indicated to us from the legal experts. In fact, even people who were opposed to the accord were granting that much.

They may not agree with the strength of the recognition, because they are talking about national objectives not going far enough and establishing standards. That is something I put to you. Perhaps the word "standard" is something that would have been more acceptable to certain groups, but it is a question of what we mean and what is not clarified by objectives. Is that something you are also suggesting, that it is not very clear what objectives are?

**Mr. Patterson:** I think our concern may be that objectives are too clear; and then when it comes to interpretation in the future of what the constitutional reform would amount to, the powers of the federal Parliament in some cases, once they were exercised, might be interpreted to be imposing standards or imposing conditions or criteria on the way social programs operated. Therefore, the power of the federal Parliament to

designate what it would be spending money for would be quite limited.

**Mr. Cordiano:** I do not know if I follow what you are saying. The general view is that without having some notion of standards being established, the provinces may be able to get around the national objectives.

**Mr. Patterson:** That is what we are saying, yes.

**Mr. Cordiano:** OK; you are agreeing with some of the other groups we have heard so far.

**Mr. Patterson:** That is right.

**Mr. Cordiano:** And maybe most of them later on, but thus far it has only been some of them.

Certainly it will be debated what exactly national objectives mean and refer to, but I think you have to recognize that the national government spending in areas of exclusive provincial jurisdiction was an ongoing arrangement kind of thing that had to be worked out. There were deals back and forth as to how the federal government would spend in those areas that the government of Canada had to negotiate with each of the governments of the provinces on all those social programs. That is how these arrangements were worked out over the years between the federal and provincial levels of government. Nothing was very clear cut.

**Mr. Coles:** I call Mr. Cordiano's attention to page 4 in our document, the paragraph second from the bottom of the page. It seems to me we are offering a suggestion there of another major contributor in the dialogue between the federal and the provincial powers, namely, the bodies of people who are at stake here.

**Mr. Cordiano:** Yes.

**Mr. Coles:** Their future should not be negotiated in their absence, but they ought to be drawn into the process of clarifying section 106A. It is not just a matter of interest between two levels of government. It is of great concern not only to the people in difficulty across our provinces but also to the agencies, such as the social planning council, that are trying to find a way of supplementing the power of those people to speak to their own future.

**Mr. Cordiano:** That leads to the next point about the ongoing process of constitutional reform. In fact, there is a provision in the accord for annual first ministers' conferences. This will be an ongoing discussion or debate and there will be more opportunity for groups, whatever sector of society they represent, to make their claims before these first ministers' conferences occur.



We are trying to grapple as a committee with the whole process and how we go about defining a process that will enhance that opportunity. I do not want to take any more time, Mr. Chairman—I know we are pressed for time—but that certainly is something we are considering.

**Mr. Sterling:** I would like to thank the witnesses as well for their very easily understood concerns. I think they have laid them out very well.

I have a lot of concern over section 106A as well. I was not pleased with the Constitution in 1982 which allowed, under the Lougheed formula, provinces to opt out in certain circumstances of our Constitution. The whole idea of a Constitution is to have a unified country, unified rights across the whole of our country. So I was upset with the Lougheed formula in terms of opting out. Section 106A not only allows provinces to opt out but also pays them to opt out, pays people to opt out of providing equal opportunity across our country. I find it extremely, extremely objectionable on that ground.

Then when I try to read section 36 of our Constitution which thrusts some responsibility on our federal government to provide people across our country with equal access, an equality of social services, I find section 106A almost the complete opposite of section 36 in the thrusts of those two sections.

My question to you is that in a political context, having been a member of this Legislature for 10 years and observing joint federal-provincial programs both under the past administration of the Liberal government and under this government, there has always been a jealousy between a federal and a provincial government as to who is getting credit for social programming. That is part of the political game.

Do you think that section 106A will discourage this federal government and any future federal government from taking an active role in providing social programs for our people? What is in it for them? They offer a program and the province is paid to opt out, the province is compensated. Then they come in with the federal bucks and get the political glory for whatever alternative program they offered. I think this is extremely dangerous.

**Mr. Patterson:** I think that is a potentially legitimate fear.

**Mr. Sterling:** Yes. Do you think it will discourage future federal governments in our country from taking a leadership role in providing social services across the country?

**Mr. Patterson:** I think it easily could. It would certainly make it in many instances much more difficult to play that role. The example we cite several times is the discussion of standards within the Canada Health Act. If the present wording of section 106A had been in effect in the recent past, an act like that could not have been passed; although if it had been passed it would have had very little force because the province could easily have opted out, claimed the cost-sharing funds and run its medicare programs as it saw fit with extra billing and all the rest of it, which to this government's credit it had opposed.

**Mr. Sterling:** Yes. That is all I have then.

**Mr. Chairman:** Just in closing, I have one question on the federal spending power. We are talking here about the federal spending power in areas of exclusive provincial jurisdiction. The only thing, and I say this as somebody who has spent some time working at the provincial level, is that it seems to me we are always in a bit of a problem where if there is not a particular program we look to the federal government for leadership often in terms of that program. But in terms of delivery, and I do not think you are saying that the federal government should be delivering all social programs because I think that would be—

**Mr. Patterson:** We are not saying they should deliver them at all.

1040

**Mr. Chairman:** But I think there is in the balance there—I do not have an immediate fear that just because a province is going to help develop standards or objectives for a program that is necessarily bad. I think there is a lot in the thrust of your recommendation in terms of clarifying and reviewing that makes a lot of sense in determining where we go, but I would want to be mindful that I do not think the federal government is necessarily always right in a lot of the different arguments or disputes we have had over the past 25 or 30 years on that.

**Mr. Patterson:** I do not think we are suggesting that.

**Mr. Chairman:** No, I just wanted to be clear on that.

**Mr. Patterson:** That is why we suggested in here that we approve, or do not disapprove certainly, of the process of negotiation as it has occurred in the past. Our concern is that a province or even a small group of provinces could in effect completely undo what the majority of provinces had agreed to and use funds in some cases literally for any purpose they might see fit under the wording of section 106A.

**Mr. Sterling:** My concern now is in terms of accountability. If we give the federal government the major tax revenue sources through various means, I still believe it has to have some strings that it can attach to any kind of program it sends out. Otherwise, the ultimate thing is that it starts backing out of collecting taxes and our poorer provinces will not be able to cope with the same level of social programs as the richer provinces, such as we are today.

**Mr. Coles:** That is true; that is the theology of balkanization.

**Mr. Sterling:** I still believe strongly that the guy who pays the bucks, the federal government, has the right to put some reasonable strings on it. What section 106A says is that the federal government will not be able to put strings on any deals we make in the future, so why do the deal?

**Mr. Chairman:** This almost takes us back to the discussions in the 1960s and early 1970s over all the major programs. I think anyone who sat in either as an official or as an elected representative can remember many of these points coming forward. I suppose it is an essential element of Canadian federalism. Maybe we will always be doing it no matter what the amendments may or may not be.

I would like to thank you very much for joining us this morning, particularly for pinpointing the concerns around that section. It has certainly been raised before, but focusing our attention on it with some of the suggestions you have made has been most helpful. There are other social service and social planning organizations that are going to be making a presentation before us, and I suspect in many instances they may be dealing with the same concern. We very much appreciate the brief and the focus and thank you for joining us this morning.

I now call upon Gayle Barnett, our next witness. Everyone should have a copy of Ms. Barnett's presentation. I will simply turn the microphone over to you. If you would like to introduce yourself briefly, then please proceed and express your views and concerns.

GAYLE BARNETT

**Ms. Barnett:** I am here primarily today thanks to Professor Peter Russell from the University of Toronto who addressed a graduate political science course that I am taking at York University in January of this year. We have a profound and fundamental disagreement on the accord; that might redefine the term "understatement." However, I would like to acknowledge with thanks his term "document of accommodation,"

which you will find extensively used in this presentation.

I am also here as a private citizen, not as a student, so take that into consideration when you ask me your questions.

**Mr. Chairman:** We are all students.

**Ms. Barnett:** Yes.

I have read the Meech Lake accord and the Charter of Rights and Freedoms. As a committee and as decision-makers, I know that you have read the Canadian Charter of Rights and Freedoms. However, I would like to know, did you then compare Meech Lake to that document of guarantees? Were you impressed with the dimension, the scope and the depth of Meech Lake; or does it leave you a little uncomfortable and a little queasy? Do you see Meech Lake as a document that will enhance us as a nation, that will encourage us as citizens, that will develop a climate of tolerance and acceptance, that will instill a sense of pride in our ability to solve our problems and live in peace and harmony?

I personally have strong reservations, although I do agree with the Prime Minister and the premiers of virtually every province in this country when they say the accord is not perfect. Not only is it not perfect, the people who signed it have yet to agree on the meaning of some of the terms they insist they agree on. One such example is the "distinct society" clause.

Let us for argument's sake define the Meech Lake accord as a document of accommodation and let us assume that the thrust of Meech Lake is to accommodate Quebec, to have les Québécois as signatories to our Constitution Act 1982. Let us accept that we are following in the tradition that began with the Quebec Act, followed by the various acts of union and the British North America Act through to the Meech Lake accord.

How does Meech Lake compare to the other documents of accommodation? If the only concern was to have Quebec sign the Constitution at no cost to, or for the mutual benefit of, the rest of the country, there would be little or no problem. In reality, there are prohibitive costs. Why? In 1981, nine premiers and the then Prime Minister ganged up on Lévesque and put together a deal they could live with without the consent of Quebec.

The same thing is happening again. We will need an amendment at some point, because the Supreme Court will have to decide on the definition of "distinct society," mainly because there is no definition now and no two premiers agree on what is meant by the term. When the Supreme Court defines the term, there will be a



perceived big winner and an absolute loser that will make 1981 seem like a mere skirmish.

The battle lines have already been drawn. M. Bourassa put the newly signed accord under his arm, immediately trotted into the National Assembly and said, "This is what we have." He then established for the record and for the Québécois the meaning of the definition of the accord for the province of Quebec. At no time did M. Bourassa state or imply that he had gotten a symbolic acceptance of Quebec as a "distinct society."

Does the province of Ontario accept and acknowledge the definition of "distinct society" delivered by M. Bourassa in the National Assembly and ratified by that august body? If we do, then let us say so. If we do not, let us define exactly what we mean when we ratify Quebec as a "distinct society." To do otherwise is to guarantee that this issue of Quebec accommodation will have to be addressed yet again.

Sections 16 through 22 of the charter offer far more protection than the ambiguous, undefined, open-to-interpretation-and-abuse language in Meech Lake. To try to argue that Meech Lake is a document of accommodation is ridiculous when the people who agreed to it and are willing to ratify it disagree on the meaning of one of the key terms they insist they agree on. This is the kind of intellectual elasticity that has produced an accord that is a poorly worded apology instead of a constructive solution.

My recommendation for this committee is that you define the term "distinct society."

Immigration: subsection 6(2) of the charter guarantees mobility rights for every citizen and every person who has status as a permanent resident. They have the right to move to and take up residence in any province in Canada.

Section 15 guarantees that every individual is equal before and under the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 27 allows for the preservation and enhancement of the multicultural heritage of Canadians.

With the above sentiments so eloquently expressed, I am sure you can appreciate that I am very concerned that the first amendment to our Constitution will severely undermine the guarantees we have yet to become accustomed to.

Quebec is guaranteed a proportionate share of the immigrant population, with an option for an additional five per cent. How long do immigrants have to remain in the receiving province? In other

words, at what point do the mobility rights guaranteed in subsection 6(2b) of the charter apply? Will the immigrants have a choice in language selection? Will they be able to select which official language will best serve their interests? When they acquire the status of permanent resident, will they then be able to exercise their choice in official language?

I can appreciate Québécois desires to protect and enhance their language and culture, but not if it means that the people who are assigned to that province on the quota package negotiated at Meech Lake denies that particular immigrant population the same rights guaranteed to all other immigrant groups in all other parts of the country.

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As you can see, immigration and distinct society are interrelated. Quebec has not been able to attract immigrants to its shores because it is a disadvantage not being able to participate in the dominant language and culture of North America. I do not know that Canada can address the concerns of Quebec on the backs of a few immigrants. I do not even know that we should. If Quebec wants immigrants, it should offer opportunities that are competitive with those in the rest of Canada, not seek quota guarantees.

It is not enough that Quebec women support Meech Lake or that Quebec men support Meech Lake, or even that Quebec politicians support Meech Lake. It is not what Meech Lake does, so much as what it does not do. It does not build a nation because it is so parochial. It does address the destructive tendencies of regionalism; it enhances them. It does not bring new people to this country as equals, but punishes some and rewards others based on where they happen to be allocated by a quota system. Is it really what the Québécois support? Must all Canadians do so; and if so to what end?

Our recommendation for the committee to consider is that the Meech Lake accord be amended to reflect and enhance the Canadian Charter of Rights and Freedoms, especially in the areas of mobility rights, equality and the promotion of Canada as a multicultural and pluralistic society.

Equality: in 1981, section 28 of the charter was successfully negotiated because of the legitimate concerns of women. It was a long and arduous battle but apparently not of any great importance to those men who were concerned with the hard work of real nation-building. Today we have 10 premiers and the Prime Minister saying they cannot accommodate the concerns of women

across this country without undermining their agreement. Tough. Who is the agreement for: the politicians and their egos or the people they represent?

At the risk of offending you, and that is not my intention any more than it is the intention of our politicians to offend us, I will offer you an analogy that best sums up the insulting treatment women are subjected to with respect to their concerns.

During the last federal election, the then Prime Minister, John Turner, was roundly criticized for patting the backside of a female campaign worker. You may recall his statement at the time was that he was a "tactile person." I thought he should have tactiled himself and still do.

Interjection.

**Ms. Barnett:** Not quite enough.

However, it seems nothing was learned by that outrage. The dismissal of women's concerns by the men who negotiated this insidious piece of constitutional legislation is very similar to a pat on the bum by those who are on their way out the door to deal with more important matters. I believe it is time to come back into the room, sit down and start to seriously accommodate with both hands on the table.

The persistent denial of women as part of the contract of citizenship is infuriating. Yet when we look at the treatment of the first-nation people, we realize that they have the dubious honour of receiving the proverbial kick in the groin. They too have been dismissed. They have been denied recognition as full status human beings with the same rights and freedoms guaranteed to you individually and collectively. Is it any wonder women get angry when we see how they are treated? It is not difficult for us to look at them and see where we were 50 years ago.

Just a few short weeks before the accord, there was a conference to address the concerns of the indigenous Canadians. It was adjourned with no agreement. There was nothing more to be said. It was time to get on with more important matters like accommodating Quebec with a document like the accord.

Enough is enough. They are not children who need our protection, unless it is protection from us. They are not savages who need civilizing before they can be given responsibility for their own lives. They should be able to decide for themselves what is civilized and what is patronizing genocide. They are no different from any of us, except for our treatment of them for economic reasons—ours not theirs. Self-determination will allow them to be equal to every other citizen in

every other province. A document of accommodation should be able to reflect that with little or no difficulty. We are past masters at negotiating deals when it is economically beneficial to us. Perhaps now is the time to do so because it is morally and socially beneficial.

The attitude of Premier Peterson is somewhat upsetting. His platitudes to the first-nation people demean not only his office but, by association, they demean me. I voted Liberal; therefore, I bear some responsibility for these omissions. I am here to say I find them totally unacceptable. I want to know how our Premier could negotiate a Canadian document of accommodation and leave out the Indian, the Inuit and the Dene. To say it was the best he could do is not enough.

We were all raised with the adage, "If you can't say something nice, don't say anything at all." It should also include: "If you can't do something good, don't do anything at all. Don't do something you know is wrong just so you can say you did something." Sometimes doing nothing gives one time to do something right.

Until we have the maturity to recognize that every individual and group is the fabric that weaves us into a distinct society, we are not ready for the responsibility of nation-building.

Until we accept that gender and race and ethnicity and citizenship are absolutes that cannot be ignored or disposed of at the whim of a few because they are too hard or too mundane to deal with, we are not ready for the awesome responsibility of accommodation.

Until we have the vision for nation-building from coast to coast, from person to person, and for person to person, let us muddle through with the Canadian Charter of Rights and Freedoms and our as yet unamended Constitution, instead of trying to justify a piece of paper like the Meech Lake accord.

There are two recommendations there which I will leave to the committee to read.

Under the amending formula, which is mind-boggling, I believe it is self-evidently absurd in a free and democratic society that unanimity is essential for constitutional amendment. The double majority that currently exists in the Constitution best reflects the democratic principles we live by. I would strongly ask that this committee consider that the amending formula be deleted from the Meech Lake accord.

In conclusion, I know we have heard for almost a year now that while this accord is not perfect, it makes Quebec happy and it allows us to be a real nation. Surely even the politicians



who signed this document do not believe that to be true. They individually do not know what the other 10 signees mean, at least not in the written form. In order to have a consensus, is it not customary to at least have agreement on terminology? Les Québécois are saying to the rest of Canada that they want the accord even though their Premier himself has acknowledged there are some concerns that will have to be addressed in future amendments. It is absurd.

Unless and until there is a definition of "distinct society" for Quebec and for Canada, there is no agreement; therefore, there is no accommodation and so there is still no solution. Unless and until Quebec accepts that the dominant language and culture of North America is not francophone, they will continue to have difficulty attracting willing immigrants who will want to remain in the province. We, as a nation, cannot accommodate Quebec on the backs of a few immigrants, so there is still no solution. Unless and until there is an automatic acknowledgement that women, visible minorities, indigenous Canadians and all the multi-isms in all parts of this country are equal, there is no accommodation and there is still no solution.

The Meech Lake accord is not a document of accommodation, especially for Quebec. It could be called a document of divisiveness or a document of discrimination, even a document that denigrates the Canadian Charter of Rights and Freedoms, but most assuredly it is not a document of accommodation.

Meech Lake seems to accommodate ineptitude and cynicism, maybe even pride. Egos are wrapped up in this agreement, political reputations are on the line. I can sympathize to a certain extent, but these amendments are for the future. They will affect the lives of our children and their children, and their children. We are making a statement about our country and the people who live in it. Are we setting the example that we want to see future generations emulate in the area of political accommodation?

Finally, in absolute conclusion, I would hope that this whole process of public hearings on Meech Lake is not one more example of the cynicism that permeates the whole accord. I would hope that there is some merit in coming to share my concerns and that this is not just an exercise that will allow new members to acquire some committee experience. If amendments will not be tolerated by the Premier, what other conclusions can one come to?

I thank you for your time and I hope you will give the recommendations that I have submitted some consideration during your deliberations.

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**Mr. Chairman:** Thank you very much for your forceful presentation. We will move into questions. Mr. Breagh.

**Mr. Breagh:** I want to say, for starters, this is kind of unusual. We do not usually have a private citizen appear before a committee such as this on this kind of document who has actually done some research and thought about the issues and read some of the documentation. It is not difficult to find somebody who has an opinion on the matter, but to find someone who has thought it through and has done a little research on it is unusual.

I really have just one question for you. We have a political problem. Although it is an attractive notion to move amendments, as an opposition member I could score all kinds of brownie points by saying, "I really like your proposals and I am going to move those amendments;" the political reality is that they would not carry in this committee; and even if I really got hot some day and got one of them through here, they would not carry upstairs in the chamber; and even if we were tremendously successful and we got it through this chamber, it would have to go through 11 other chambers with probably 1,000 or so politicians in Canada, across the country, with about eight million opportunities not to call the motion, to talk it out for the afternoon, never to bring it to a vote. This could go on for about four centuries before the amendment I proposed in this room actually got ratified across Canada.

The Premier and the Prime Minister have really put us in a nifty situation where you cannot win. So what we are looking for is any other way to go about seeking the changes we want without moving amendments, which is the traditional way we would do it. I think we all have to admit that this process stinks, it is completely ass-backwards, it is wrong from day one but the process has happened, so it is our job to see what we can do to rectify it.

One of the things a number of groups have suggested to us and that I am coming to the conclusion would be useful would be to put a reference to the Supreme Court to resolve the question as to whether or not the Charter of Rights is overridden by this accord or not. We have seen a difference of opinion among the experts as to whether that is true, whether an amendment such as the one you suggest would be relevant, workable, acceptable.

If we were able to find a number of alternatives, a reference to the court, an indica-

tion not to proceed with certain parts of the agreement until other things were done—the resolution of aboriginal rights—would that solve some of your concerns around the Meech Lake accord?

**Ms. Barnett:** I am not quite sure what the question is.

**Mr. Breagh:** Let me put it blunter terms then. Do you hate this damned thing so much that we should throw it out the window; or should we try to find some way to clarify what is in the accord, resolve the anxieties that a lot of people have about whether something they just gained in the Charter of Rights a few years ago has now been taken out of the thing? We probably could resolve that, should the Supreme Court co-operate. Is it our job just to say no to this on these grounds; or is it our job to try to deal with the various problems that people have legitimately brought before us and see whether we can answer those problems?

**Ms. Barnett:** Absolutely, it is the latter. Define for me “distinct society.” Define for me my rights as a woman. Are they lost under section 28? Does section 28 still apply? The group that was here before, the social planning council, has some very real concerns because there is not a defined term. What the politicians agreed to behind closed doors is not reflected in the document in writing. Does it apply to all of Canada? If this is a Canadian document, does it apply to all Canadians?

**Mr. Offer:** I would like to echo the words of Mr. Breagh with respect to thanking you for coming forward with respect to this presentation as a private citizen who has done some research. I can assure you, and I guess I speak for all the members of the committee, we too have done our reading.

**Ms. Barnett:** I am sure you have.

**Mr. Offer:** We do appreciate very much this type of presentation.

My first question deals with your fifth recommendation, and it is just really a matter of clarification. You asked that the amending formula be deleted from the Meech Lake accord. What should it be replaced with?

**Ms. Barnett:** The one that is currently in the Constitution, the double majority.

**Mr. Offer:** I just wanted that as a matter of clarification.

On that particular point, one of the reasons the unanimity formula was inserted was that dealing with national institutions which affect all the provinces, dealing with matters which equally

affect all provinces—understanding, of course, that not all provinces have the same population, but we are dealing with something of a very fundamental nature—all provinces should of their own right have to agree with respect to any change in those particular fundamental institutions.

I would like to get a sense from you as to why we should not give that right to all provinces with respect to those fundamental institutions in this country.

**Ms. Barnett:** I guess I can only answer that on a fundamental basis. You have never had a referendum in Canada on fundamental issues, and you would not seek to have the consensus of Canadians. You do it within the political arenas. You would never in your wildest dreams expect all Canadians to agree on anything. We live in a democracy. I can appreciate that we would like all provinces to participate and have a say, but we cannot allow one province to say no to 10, or more if there were other provinces in the Northwest Territories, to what virtually is consensus; if nine, eight or seven provinces agree, you have consensus in the country, which you do not have now even with Meech Lake.

**Mr. Offer:** I understand what you are saying. Obviously, I personally have difficulty in agreeing with that, because what we are talking about in the unanimity section are areas that, to my way of thinking, in my personal opinion, are just the very essence of national institutions. It is just my feeling, and obviously I see that you disagree, that these are areas where all provinces really should be able to agree, or must agree, before any change is made.

**Ms. Barnett:** May I give just one example?

**Mr. Offer:** Sure.

**Ms. Barnett:** Apparently 10 provinces and the Prime Minister of this country saw fit, under the equality sections of Meech Lake, to exclude women's concerns; they are continuing to do so. How does that enhance us as a nation and our national institutions? I do not see that it goes anywhere. We are on a circular motion here. We either live in a democracy or we do not. Unanimity is going to defeat the national institutions. If nine provinces say yes and one says no, I do not see that it is going to enhance our relationships.

**Mr. Offer:** You bring up an interesting point. If I might just carry on with the point you brought forward—I imagine you are talking about section 28 not being included in section 16. We have heard from other deputations. I believe Professor



Hogg indicated that section 28 is not exclusively an interpretative type of section but in fact could be argued as a rights-giving type of section, and as such it is not necessary to include section 16, which really does incorporate just interpretative sections and puts them on a par with the distinct society. That is just in response to your concern.

The last question I have is with respect to your recommendation 4. You talk about the accord including a statement with respect to self-determination as a matter of right for the first nation people. The question I have is, with respect to the constitutionalization of first ministers' conferences dealing with constitutional matters on a yearly basis, could it not be said that the opportunity exists, maybe more than ever before, that matters such as this, matters such as concerns of the Northwest Territories, the Yukon and other persons, would be addressed on a timely, yearly basis, or at least would have the possibility of being addressed?

Without talking about the particulars of recommendation 4, and just discussing the fact that right now we are dealing with an agreement that for the first time says we are going to make certain that we deal with issues of this magnitude on a yearly basis, I am wondering whether that gives a sense of optimism, a sense of looking forward, a sense of continually evolving this Constitution to identify and address needs and to make certain that we meet those needs.

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**Ms. Barnett:** I believe you have already received a delegation from the Northwest Territories.

**Mr. Offer:** Yesterday we heard from the Northwest Territories and the Yukon.

**Ms. Barnett:** Were they all excited about the exclusion? I believe they are asking for self-determination as a matter of right.

**Mr. Offer:** Not necessarily. They certainly had concerns—

**Ms. Barnett:** They are certainly not jumping for joy on Meech Lake.

**Mr. Offer:** They were very much concerned with the process. But with respect to the question of self-determination for first nation people, my point is that we now have in this document the constitutionalization of a first ministers' conference yearly to deal with the matters of this type of importance. I believe personally that in many ways we have now set up the forum for these matters to be heard on a year-by-year basis.

Certainly we have heard concerns with respect to how that process is to take place. We are going

to have to grapple with that, and we have been grappling with that since day one; but the fact is that now it is in that Constitution and the forum is there. I would like to get a sense from you as to whether possibly this particular concern has at least the opportunity of being met and realized through that section in the accord.

**Ms. Barnett:** I put that recommendation there so that it would be a part of the process, so that it would in fact be put on the agenda. There is nowhere in Meech Lake that says that indigenous Canadians will in fact be put on the agenda, that women will in fact be put on the agenda—we can go on. Put it on the agenda and kick it into the process.

**Mr. Eves:** I just have one brief question. I would agree somewhat, I suppose, with Mr. Breaugh about political reality. I would say to you at the outset, although I may sympathize with some of the points that you have made, I think it is asking a little much to ask this committee to define "distinct society." I think that is something that the courts will decide over a period of time in individual cases.

However, I do have a great deal of sympathy with respect to the point you made with respect to section 28 of the charter. We have had numerous delegations appear before us already, and we are not even anywhere near halfway through the number of people whom we are going to be hearing from.

We have had Professor Baines, for example, from Queen's University, in the very first week that this committee sat, who was also concerned about protection of women's rights and, of course, the obvious omission of same in section 16 of the Meech Lake accord which, as I am sure you are aware, only protects multicultural heritage and aboriginal rights.

One suggestion that both Professor Baines and other groups have made is that perhaps not only should the rights under section 28 be protected but all rights under the Charter of Rights and Freedoms should be protected. Would you be in favour of such a simple amendment?

**Ms. Barnett:** Obviously. My concern is that since section 28 was excluded. Clause 16 of the accord specifically deals with multiculturalism and aboriginal rights, sections 25 and 27 of the charter, so obviously section 28 is not included because otherwise it would have been mentioned. That is my concern, that because it was excluded it is not in fact included.

**Miss Roberts:** If it is not included, maybe it is because it already is supreme and has supremacy over what is included in section 16 anyway.

**Ms. Barnett:** Again, we are defining our terms.

**Miss Roberts:** That is right. But that is the legal argument, and there has not been any particular answer to that. You used your words very well; it is apparently that, not necessarily that.

**Ms. Barnett:** That is right.

**Miss Roberts:** I hope we all agree that it is not necessarily that and that indeed section 28 is supreme.

**Ms. Barnett:** It had better be.

**Miss Roberts:** I think we have to go on that basis.

**Ms. Barnett:** I want it.

**Miss Roberts:** And there is no reason to believe it is not.

**Mr. Chairman:** I want to thank you very much.

**Ms. Barnett:** Thank you.

**Mr. Chairman:** As other speakers have said, we do appreciate—you, in fact, are the first private citizen we have heard. That is a term that at some point we are all going to have to define.

**Ms. Barnett:** Does that mean I am a Canadian?

**Mr. Chairman:** They come forward in so many different capacities, and here we have a living, breathing private citizen.

**Ms. Barnett:** A real person.

**Mr. Chairman:** We thank you very much. As I am sure you are aware and as other members have said, a number of the points that you have raised certainly have been raised by other organizations and indeed will be raised as we go through our hearings, but we are grateful for your taking the time and coming before us today.

**Ms. Barnett:** Thank you for your time.

**Mr. Chairman:** I would now like to call the representatives of the National Congress of Italian Canadians, if they could come forward to the table: Angelo Delfino, first vice-president at the national level; Gregory Grande, president of the Toronto district; Manlio D'Ambrosio, president of the Ontario region; and Ms. Annamarie Castrilli, member of the Italian Canadian Women's Alliance.

We are in your hands as to how to proceed and whomever you would like to designate as the first spokesperson, please do so. We are running a bit behind, but we do want to make sure that we give you adequate time to make your presentation. If we could think in terms of approximately the half

hour or so in which we are trying to deal with presentations, that might help in the proceedings. Whoever would like to go first, please do so.

## NATIONAL CONGRESS OF ITALIAN CANADIANS

**Ms. Castrilli:** I would like to begin by talking very briefly about the National Congress of Italian Canadians, specifically the Toronto and Ontario region, which we represent.

I am the only member of the delegation who is not a member of the executive of one of the levels of the congress. The Toronto and Ontario components of the National Congress of Italian Canadians—you will see there is a chart in our brief showing roughly how the organization is set up—represent roughly 600,000 Canadians in Ontario. The organizations have traditionally worked independently and together to lobby and represent the interest of the those Canadians, and their latest collaboration is this particular brief.

Before discussing some of the issues that are addressed in the brief, I feel it is important to state that this brief represents a result of a very difficult journey into the discovery of what it is to be a Canadian today in Ontario, a Canadian who is non-French, non-English and, if this document has anything to say about it, regardless of what has been said previously nonmale.

I think the journey for us has been oftentimes pessimistic. I think our conclusions about individual rights, as they are protected in this accord, have been pessimistic. How these rights have been acknowledged and safeguarded have been, for us, pessimistic conclusions.

The realization that the concerns of those who have spoken in favour of equal rights could have been so easily dismissed in the past—as we have seen in the federal hearings—is also a source of great sadness. We are nevertheless confident, which is why we are here, that Ontario will set a new standard and will follow the Premier's direction, as he has stated, that changes to the 1987 constitutional accord will be possible if we can demonstrate that substantive rights of individuals are affected. I think we are going to take him at his word, and we propose to show how that, in our view, has occurred. We are therefore confident that the concerns of this delegation will be heard and carefully considered by your committee.

## 1120

Another issue that I think we should discuss before we launch into some of the recommendations is the whole position of the congress vis-à-vis Quebec. I think it is trite to say, as has



been said to you before and likely will be repeated to you again, that this is not an anti-Quebec stand. In fact, I think you will notice from the fundamental premise, which is stated at the beginning of the brief, that our response to the 1987 constitutional accord is that Canada is a land whose inhabitants feel that the dream of equality is within their grasp, largely made up of immigrants who have come here with specific goals of achieving better opportunities for themselves and for their children, and that means similar opportunities and similar access to services and similar rights.

Je voudrais répéter cela en français, car ce principe est extrêmement important. Le principe fondamental de cette réponse à l'accord est que le Canada est un pays où l'on rêve toujours d'avoir l'égalité à portée de nos citoyens, bien qu'ils soient de différentes cultures, de différents âges ou de différentes religions et possèdent différents talents. Dans ce contexte, les hommes et les femmes s'efforcent de vivre et de travailler ensemble dans un pays où ils ont des chances égales, le même accès aux services et des bénéfices égaux.

It cannot be said too often that the recognition of full participation of Quebec in this mosaic is of critical importance. La reconnaissance et la pleine participation de la province de Québec dans cette mosaïque est d'une importance clé.

The position taken by the congress, therefore, is to be construed as one which is fully cognizant of the concerns of Quebec and of the need to make some changes to the Constitution Act of 1982 to gain Quebec's assent. While the Constitution Act of 1982 may have been binding on Quebec, it is surely not acceptable that any province should be bound against the will of its people.

With that in mind, I will turn to some of the issues. You will appreciate we cannot go through the entire brief with you, but our first concern involves the process by which this accord was arrived at. Our view is that if the Constitution is to mean anything at all, it is to develop a framework within which Canadians can live by seeking input into that framework. What has happened to date is that Canadians have not been consulted, and we would hope that will not be something which will set a precedent for time to come.

Our first objection to the accord, if you like, is to be found with section 1 of the accord which sets out a description of Canada which we feel does not reflect the Canada that we acknowledge exists. Section 1 of the accord totally ignores that

in Canada since 1971 we have had a policy of official bilingualism which has worked in tandem with multiculturalism. You will note that in our brief we document that quite extensively and you might want to refer to that at some point.

Section 1 is at least arguably open to the interpretation that the recognition of multiculturalism and of the fundamental characteristics of minority cultures and of the native population in Canada is denied. This interpretation is borne out by the fact that the section states that the role of Parliament and the Legislature is only to preserve the fundamental French-English characteristic and the distinct identity of Quebec. The multicultural character of Canada, which we submit constitutes the majority of us, is thus ignored. That can lead, in turn, to the perception that after the accord some Canadians will be more equal than others. If ratified in its present form, it is our contention that the document will make second-class citizens of all those who are not members of the two founding races.

The accord, in fairness, has attempted to address multiculturalism through the drafting of section 16. I will not repeat that to you. I am sure you know it by now verbatim. That section specifically says that section 27 of the Canadian Charter of Rights and Freedoms is not affected. Section 27 states that: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." That section, however, is not a guarantee of multicultural rights. It is only a rule of interpretation and it pertains only to the charter and not to the Constitution as a whole. We will touch on the significance of that in a moment.

The combined effect of these legislative provisions, from our point of view, is that while the Constitution as a whole must be interpreted in a manner consistent with bilingualism, only the charter is to be interpreted in a manner consistent with multiculturalism, thus our contention that multiculturalism will attain second-class status in this country.

If you look at the decision of the Supreme Court of Canada in the reference on Bill 30 which was handed down by the Supreme Court on June 25, 1987, you will see that the justices stated quite clearly that there are certain constitutional rights which are immune from charter review.

Since section 16 of the accord refers only to those rights which are in section 27 of the charter and since section 27 is only a rule of interpretation for the purposes of the charter, it follows that, in view of the Supreme Court decision, the

recognition of multiculturalism is weakened. This will lead to the reality that multiculturalism may, in fact, if a case gets to court, be ignored in specific circumstances. Where there is a conflict between the accord and the charter on the one side and the Constitution on the other with regard to multicultural rights, the recognition given in the charter and continued in the court could therefore be overridden.

In fairness to the premiers and the Prime Minister, when they signed the accord they did not have the benefit of the Supreme Court decision of June 3, and it would not be untoward to suggest that the accord should, at the very least, be examined in the light of that decision and its impact on multicultural rights.

We therefore suggest, as a first recommendation, that the accord be amended to include something to the effect that the multicultural characteristic of Canada is also a fundamental characteristic. There has been some discussion as to whether what really should be done is to add a preamble to the Constitution setting out the various components of Canada. For our purposes, we are dealing with the accord, and if it is the accord we are dealing with we suggest that is something that has to be addressed.

For us, section 1 of the accord also poses some problems with regard to equality. I think if you read section 1 and section 16 together, it will become immediately apparent. Section 16 of the accord specifically ignores the equality sections set out in section 15 and 28 of the charter. We will not get into a lengthy recitation of those.

The exclusion of those sections from section 16 of the accord leaves the impression that priorities are being set, that the equality rights professed in those sections, regardless of the comments that have been made to the previous speaker, will be secondary to section 1 of the accord. As a matter of statutory interpretation, since section 16 of the accord specifically identifies only two charter provisions and two constitutional provisions, other provisions of the charter and of the Constitution may be ruled not to apply to section 1.

1130

If, however, sections 15 and 18 have been excluded because they are self-evident, or as has been said here because they are predominant, and if they are self-evident truths which cannot be threatened by section 1, then we do not see what harm there is in clearly stating that in the accord for all to see. This can be rectified very simply by changing section 16 of the accord to state that

nothing in the accord affects sections 15 and 28 of the Canadian Charter of Rights and Freedoms.

It has been asked here before whether the whole charter should be included under section 16. I think, in practical political terms, that may not be acceptable to Quebec, but I will leave that for others to judge. From our point of view, the equality of Canadians cannot be jeopardized by ambiguous language. We have got to be crystal-clear, and if we are so sure then I think we should say so.

We have been assured that it is not intended that sections 15 and 28 are not to apply. The fact is that during the discussions which led up to the 1982 constitutional accord, we were given assurances that the abortion laws would not be jeopardized by the charter. Now, regardless of what your feelings may be about abortion—this is not a moral issue but simply a legal argument, and it could be just as equally applied to any other issue, car theft, if you like—the fact is that the Morgentaler decision expressly used the charter to overrule the abortion laws. That can happen again with regard to other substantive rights. You cannot take the words of politicians as they are discussing and deliberating to be conclusive on the evidence when the issue comes before the Supreme Court of Canada; I think it is naïve to think that Hansard will be considered at every turn.

As has been mentioned I am sure by speaker after speaker, we also have concerns about what “distinct society” means. It is clear that as of 1867 Quebec has been given specific rights. It is a province in its own right; it has its own common law system; it has its own system in education; it has since then opted out of the pension plan and so forth. If that is what “distinct society” means we do not have any objection to stating it and we will be happy, but I think there has been too much discussion on what the phrase means to different people. It is clear there is no consensus.

I think at this point in time it is incumbent on this committee to make a recommendation. I realize the committee itself cannot define what “distinct society” is, but it is incumbent to make some sort of recommendation to the effect that “distinct society” ought to be very clearly set out. In the material before you in the past, it has been pointed out that Quebec’s view of “distinct society,” even from minister to minister and political party to political party, is quite different from what we may think “distinct society” is. We therefore recommend that that particular clause be clarified for all concerned.



Dealing with some of the other aspects: as you will see from our conclusion, if it is impossible to have a wholesale series of amendments to change what we think is fundamentally wrong with the accord, then clearly our objections to section 1 are the ones that should prevail and to which this committee should address itself.

With regard to immigration, we certainly have some concerns about section 3 of the accord and what that will do when the provinces and the federal government come to negotiating agreements on immigration. You will see from our text that worries here involve fragmentation of services and delivery of services, different policies being set by the different provinces. We are certainly concerned about the ambiguity of the language which does not resolve a great many issues: for instance, who is going to set the yearly totals? Will the federal government still have a role in monitoring services for adequacy and ensuring equality across the country?

Those are issues we are trying to address here. In fairness, those are policy issues, and I can understand the argument that might be made on the other side. I think we would be quite content to leave it at that if there were some assurances in the accord that the agreements that are entered into by the federal government and the provinces were not going to be done in camera and bartered without some public input. I think that is the concern here. We say that because the accord is very clear on the point that any agreement between the Premier of a particular province and the Prime Minister has the force of law. It can be done by a series of exchanges of confidential information and suddenly there we are, it is brought to life. So we are concerned about that.

We are concerned that those immigration agreements may be used as specific tools by specific provinces to weaken the multicultural character of this country. It would be very simple to say, "We are just not going to accept a particular group." If the concerns appear paranoid, they are not; they are simply questions that we have about the process. There should be something in the agreement to say that whatever negotiations are held with respect to negotiations will allow the opportunity of public input. It is clear that not every meeting between the Prime Minister and the premiers must be done under the glare of television cameras. That is not what is being suggested here. But certainly there must be some input from the people who are directly concerned or from private citizens who also have an interest.

With regard to shared-cost programs in areas of provincial jurisdiction, I think much has been made of the fact that some of these shared-cost programs in fact forge our national identity, that they may be what make us Canadians. I will leave that to the authorities to discuss.

The point here is that we are not insensitive to Quebec's position on this issue and to the fact that programs ought to be sensitive to regional differences. That is not the issue. Again here, as in immigration, we are concerned about a potential for fragmentation of services where you have provinces which opt out, which do not have to follow any federal "standards" but only "objectives." Much has been made of the definitions of those two words. I refer you to our paper, as well, for additional guidance on that point.

In particular, when one looks at the French text of the accord, when one looks at the word "compatible" in French, the meaning is quite different. Again, I refer you to our paper in that regard. It is clear that you just have to have programs that are capable of existing together in some fashion. That is quite a far cry from what we have now.

We wonder what will happen, for instance, in the next medicare crisis when extra billing is again an issue. Will provinces be able to say: "But look, we are spending the money on health care. What does it matter if doctors extra bill? There is no federal standard in force. We feel that we are complying with national objectives, because our program is capable of existing together with yours." Those are questions that I think have to be addressed.

We are worried that programs will become substandard, that we may indeed have no more national programs. If day care is still a priority in this country, then clearly under the present accord it will be very difficult to achieve. We are mindful of the difficulties, and our recommendation would be that we change the words "national objectives," as I am sure you have heard before, to "national standards."

I think the language of section 7 ought to be expanded to include some sort of definition of federal criteria and of the role of the federal government to implement programs. As you can gather from our presentation, we feel there has to be a balance between the federal government establishing national priorities and the regional governments establishing regional priorities. There has to be some sort of accommodation between those two.

1140

With regard to Senate and Supreme Court of Canada reform: dealing first with the Senate, which in some sense is easier and in some sense is more difficult, our first point is that as presently set out the accord will make reform of the Senate very difficult. I will deal with that when we get into the constitutional amendment section, but I guess we would say that with respect to the Senate, if we are really serious about reflecting Canada then we ought to have some means of appointing senators as the present system calls for.

This is not by any means an endorsement of an appointed Senate. But dealing with the reality, I think an appointed Senate, as we have now, certainly should reflect the fact that we have at least 33 per cent of this country that is of non-French, non-English background and growing all the time, and that 50 per cent of the population and more is female. The current statistics for the Senate do not bear that out in any way, and there is some documentation to that effect in our brief.

With regard to the Supreme Court of Canada, I think some of the same comments are true. The fact that there is no representation of any consequence from the female half of the population—we have two, of course; and the fact that there is no representation from the other cultures, if you like, presents some difficulty. The history of the Supreme Court of Canada with regard to minority rights and to women's rights has been less than laudable, shall we say. In our brief, we cite some of the cases and some of the results.

The reality is that you must have justices who not only have a knowledge of the law but can take judicial notice of Canada as it presently exists. To say to Mrs. Bliss that she was not discriminated against because a man, if he had been pregnant, would have been treated in exactly the same fashion, is a little silly. Yet we have decisions on the books to that effect.

Those are issues which will have to be addressed with regard to Supreme Court reform. We do not see that the accord addresses those issue. The accord only deals with lists which are to be presented by the provinces with no guidelines being set as to what kind of makeup there should be in the court.

On the issue of constitutional amendments, much has been made of the fact that there are restrictions in the accord; in fact, we have three formulas for amendments in our Constitution. The accord only presents one of them. The

difficulty that we have is that the issues to which the accord addresses itself in terms of constitutional amendments are fundamental. There is no question: you would not want to change the Constitution lightly and that is not what is being advocated. I do not think anyone who is responsible and interested in the subject has said that.

The fact is, however—and it has been noted elsewhere, particularly in the report of the federal committee on Meech Lake—that provincial-federal unanimity in this country has rarely been achieved. To suggest that now with the accord we are suddenly going to enter into a new era, I suspect is a little naïve.

As I have said, no one is suggesting that the Constitution be lightly changed, but on the other hand I think we have to devise a realistic formula for members, and one which will not take Canada and encapsulate it in 1987 with regard to certain basic issues and say, "This is it." I think there has to be at the very least, as we suggest in our brief, some mechanism for breaking stalemates when and if they occur, so that the principle of unanimity could stand, but in certain select circumstances there would be some procedure for overcoming it.

From our point of view minority rights, which may indeed be affected by this formula, and I think I would look to the creation of new provinces, for instances, as falling into that, are not the most popular of fashionable issues from time to time. Those are the issues that are going to suffer if this amending formula stays as it is.

Briefly, on constitutional conferences and the like, I think we certainly support the idea of yearly exchanges between the federal government and provincial governments. There is no question that this will certainly enhance federalism. If that is all section 8 said that would be fine, but section 8 goes on to say, specifically with regard to conferences on the economy and such other matters, that they may discuss such other matters as may be appropriate or agreed upon.

The fact is—and I think a case has been made for this by Senator Eugene Forsey, who certainly is acknowledged as a constitutional expert—those clauses can be interpreted to mean that unless there is unanimity certain basic issues will never come to light. With respect to the Constitution we will certainly discuss Senate reform and fisheries, but if the provinces do not agree with the federal government as to what else is going to be on the agenda, we may never see other issues come up.



From our point of view there are some significant issues that ought to be discussed. Multiculturalism of course is only one. We may have very well want to include a whole host of issues, which we may never have an opportunity to discuss.

The other problem, of course, is that if constitutional conferences are going to be held from now on from behind closed doors, then I think the interests of the Canadian public are not well served. I think we have a democratic tradition in this country which calls for an active role by legislatures, which calls for an active role by interested individuals, and this accord does nothing to enhance that tradition.

You will see a summary of our recommendations on pages 34, 35 and 36. From our point of view, the most fundamental ones, if some sort of accommodation has to be made, are the recommendations made with respect to section 1.

There is no question that the congress wishes to accommodate the province of Quebec, as do many other sectors. The present situation is certainly not acceptable, but I think not to recognize the inherent rights of one third of the population who are not French or English, and the one half that is not male, is pretty close to an egregious error and certainly not to be tolerated.

I do not think we can rely on the courts to safeguard the rights of those segments of our society. I think our paper documents that and I think constitutional law bears this out. Where you have an important document which is couched in such ambiguous language, you can bet that those rights will not be safeguarded.

The Premier of this province, as we said at the outset, has promised that where the "distinct society" clause can be shown to have an effect on the constitutional rights of the individual, a change in the accord is possible. We trust he will follow through with that resolve.

**1150**

I do not think it is in anyone's best interests not to reconcile with Quebec and we certainly should find appropriate ways of doing so. I do not think we should throw this accord out; I think it is an excellent first draft. But we think the reconciliation with Quebec should not occur at the expense of other segments of the Canadian population, who do not deserve to be treated as less than full participants. That, we do not feel, is justice.

**Mr. Chairman:** Thank you very much. We appreciate your setting out the recommendations and some of the thoughts behind the recommendations. I am mindful of the time, and we do have another group that will be addressing us before

the lunch break, if members could just be aware of that as we address our questions.

**Mr. Cordiano:** Very quickly and briefly, you have touched on a number of issues and by no means will I be able to do any justice with my questioning on all of the issues I would like to get into. The time is simply not there, but I would like to thank you for giving us a very concise and thoughtful brief. You certainly have done your homework. These are complex issues and we appreciate that.

I want to talk about a couple of things which you mention and which stand out for me. Looking at the whole notion of multicultural rights, when I look at section 27 of the Canadian Constitution Act, 1982, and at the Charter of Rights and Freedoms, section 27 obviously deals with multicultural heritage. We would agree, having discussed this with the legal experts who have come before this committee, that this section obviously does not grant rights. It is not a rights-granting section of the charter. You would agree with that?

**Ms. Castrilli:** Would I agree with that? Was that the question?

**Mr. Cordiano:** Yes.

**Ms. Castrilli:** Oh, yes. I thought I said that very clearly.

**Mr. Cordiano:** OK.

**Ms. Castrilli:** I do not think there are any substantive rights. Therefore, we really do not know where multiculturalism stands—it is in limbo at the moment—in relation to the "distinct society" clause.

**Mr. Cordiano:** Let us look at 1982. The mere fact that section 27 is added to the charter does not grant rights. Let us look at the definition of multiculturalism. I have asked this question of various groups that have come before this committee and asked for their definition of multiculturalism, and certainly I continue to do that on a daily basis because I think not all of us would agree on the same definition of what multiculturalism is, although there is some vague notion about what it is.

I think you would agree with me that multiculturalism attempts to define something that all Canadians would ascribe to it and that is that their cultural heritage, regardless of where it is from, is meaningful to them and is something that we should be able to retain as individual Canadians.

When we get to that kind of definition, that might differ from a lot of other groups. They might say, "We have multicultural groups and

we have ethnic groups and they need multiculturalism." That comes from 1982. I say to you, where is the difficulty in the accord or is there an advancement of that cause in the accord? Was there one at the point in 1982 when section 27 was added to the charter?

Quite frankly, there are no rights to multicultural groups that exceed the rights of any other individual in our Canadian society. That is not what I am understanding from all this. I am not a constitutional expert. I have certainly asked this question of the constitutional experts and they would agree there are no rights that exceed anyone else's rights in our country, any other individual's—

**Mr. Delfino:** I am sorry. I thought you had finished. Before Annamarie may want to answer that question, I wanted to interject and say that we may not necessarily agree on the definition of multiculturalism, but what we try to bring forth is that we do agree on the equal rights of all Canadians, and this accord should reflect the equal rights of all Canadians. We are proposing that it does not and that is fundamental as far as I am concerned, much more so than definitions.

**Mr. Cordiano:** What I am trying to get at, though, is how does the accord affect someone who is not English or French in his or her ancestral background? Are you saying that it somehow takes away rights that were there from someone who is of that background, neither English nor French? The only way you can say that is if you would agree with some people that the Charter of Rights and Freedoms is somehow eclipsed by what has been brought forward in the accord. If you are saying that, then that is a debate that certainly one has to pursue. On the whole question of multiculturalism, this is where I am having difficulty. If you could clarify that for me, I would appreciate it.

**Ms. Castrilli:** It is a very long question and I am not sure that I am qualified to give all of the answers I am sure it deserves. We are in a state of transition as far as I can see. Like all other societies, we are evolving towards a recognition of who we are. We have made steps. We have official bilingualism. We have a policy of multiculturalism. We have had it for 17 years.

We now have a federal act dealing with multiculturalism, which does give some assurances. That, of course, is not recognized in here because the federal act of multiculturalism was not introduced until well after June 3. Again, that is one of the other issues that I think ought to be put in the hopper and discussed and has not been

here and could not have been there in 17 hours of negotiation. That is part of the problem.

Given that reality, given the fact that multiculturalism is acknowledged everywhere to be a fact of life, one would have thought that in section 1 of the accord you would have at least paid some lipservice to that. You do not throw it in under section 16, but if section 1 is, as has been said, nothing more than a description of what Canada is, then I suggest to you it has missed a very large component of what Canada is. That is our position.

**Mr. Cordiano:** If I could just ask you this, should that not have been done in 1982 as well? The requirement existed at that time as well.

**Ms. Castrilli:** To the extent that it could have been possible, maybe it should have been done in 1867.

**Mr. Cordiano:** That is my point. I think that job has been left unfinished and I think you make a very good point, that indeed, if we really believe in a multicultural society, then certainly we have to make every effort to ensure that nothing overrides that. Of course, the accord does not do that, in my opinion, because what was there before is there now in the accord under section 16. What you are putting forward to me, if I understand this correctly, is that you are asking for additional rights that are not there.

**Ms. Castrilli:** No, I think what we are asking is for a description of Canada that reflects the reality that is Canada.

**Mr. Cordiano:** But that, in essence, is like granting a right.

**Ms. Castrilli:** I do not think that is necessarily so. We can quibble as to whether there ought to be substantive rights attached to multiculturalism and I would say to you that if the federal government is prepared to enact an act on that basis, then clearly there is an intention at some point in time to give substantive rights which are not reflected in this document and could not have been at the time. There is no question there.

The fact remains that section 1—and I think the arguments you have heard with regard to "distinct society" bear this out; certainly the things I have read bear it out—should not give substantive rights to anyone. What I have heard is that it is a description of Canada, and if that is the case, that is what we ought to be doing.

If we are now saying the "distinct society" clause, which we do not understand because there is no unanimity as to what it means, gives substantive rights to Quebec, does that not make the situation worse? Should we not know



precisely what those substantive rights are? I am making the best case possible.

**1200**

**Mr. Cordiano:** I want to make one last point, one very brief point. I see what you are saying. The difficulty I have with that is that we have all kinds of descriptive passages even in the Charter of Rights and Freedoms. For example, who is going to define what a "free and democratic society" is? That passage exists in the Constitution of the Soviet Union, which many people would describe as a very totalitarian state.

Words are difficult to translate into action if the will is not there. So I think we try to be very clear and I am sure that all the lawyers who drafted the words, the legal experts, the constitutional experts, try to be very clear about what they mean. But we are going to have debates about that, are we not?

**Ms. Castrilli:** Yes, we are. I think the answer to your question, very simply, is that two wrongs do not make a right and just because you have ambiguities everywhere else or anywhere else does not mean you should tolerate them here.

**Mr. Chairman:** I think we can go on at some length there, but I think the issue is joined. Mindful of the time: Mr. Breagh.

**Mr. Breagh:** Two quick questions for you: One, it does seem to me that much of what you said to the committee today, and it was certainly well said and well researched, centres on the question of whether anyone has actually lost ground by means of this accord. If we could make that determination clear as to what is the relationship between the charter that came out in 1982 and the accord that came out this year, if we were able to clarify that situation, we would at least tell people what the new rules are or if there are new rules. Is that kind of central to your argument?

**Ms. Castrilli:** I think that is right.

**Mr. Breagh:** OK. The second thing I want to pick up on a little bit here is the process stuff. We are always cursed with the notion that whenever we write a law, some fool judge out there will interpret it the wrong way, but there is nothing we can do about that. That is why there are judges and courts and lawyers and everybody has a legal right to appeal. So we cannot do much about that part of the process, but we certainly can do a lot more around the process before it becomes law, in terms of input, so that there is some clarity.

I am perplexed a bit with this problem about the process of how we came to have an accord and whether it in itself has really shattered

perhaps even the best of intentions. I would be interested in your response to this. Various groups coming before us have no idea, and neither do I, as to what was the intention of the 11 wise people who put together these words. This was all done behind closed doors and it is causing immense problems.

I would like you to comment a little bit on the damage that I see being done by the process itself. If these people had held their deliberations in public, we would at least know, was there a hidden agenda that excluded the territories and the Yukon? Did they really mean to desecrate multiculturalism from one end of the country to the other? Just exactly what was the game plan and who were the players? Is it possible now to take this process and rectify some of these problems?

**Ms. Castrilli:** I think that is why we are here. We are confident that Ontario will do that in some way and that a precedent will not be set. If the first ministers choose in the future to have such secret rendezvous, we hope the provinces will see fit to have open-air discussions and exercise their free vote and require public input so that we will not have constitutionalized executive decisions. That is what concerns us about the process. We certainly hope that in Ontario, decisions will not be made along party lines but that there will be a free vote.

I think I said at one point we are not trying to suggest that all meetings ought to be under the glare of lights, but it would have been nice to know what was on the agenda at the time. Certainly, even with the talks leading to the 1986 Constitution, which were far from perfect and there were screams and hues and cries even then, at some point there was input. That is why section 27 was put in. That is why section 28 was put in. Without public input, those sections would not have been there and we would have been a poorer country for it.

**Mr. Breagh:** I think you have proved your point this morning.

**Mr. Delfino:** May I make one point? Both members of the provincial parliament have referred to the whole question of the Constitution as wins and losses, and that may be the case. When we are talking in terms of questioning whether we feel that multiculturalism has lost through the accord, that may very well be the case.

But what we are concerned about is the fact that we are not dealing with wins or losses; we are dealing with the fact that the reality of the makeup of Canada has changed in the last

number of years. While certain rights and certain items may not have been looked at in that particular light and in that particular reality before, there really is nothing necessarily wrong with addressing that question now and recognizing the new reality of Canada.

**Mr. Sterling:** I am not going to ask a question. I just want to thank you on behalf of our caucus for bringing forward a very good brief. We have a great deal of frustration in our caucus with regard to the process that has gone on. In spite of how good your brief is, we are really tied in terms of what we can do because Premier Peterson and the other premiers and the Prime Minister have said they are not going to listen very hard to anything we do.

**Ms. Castrilli:** There is a hope on the horizon in response to the question you asked of the previous speaker about a reference to the Supreme Court of Canada. In fact, the Globe and Mail has announced that John Sopinka is planning to take such a reference on behalf of the territories. That may be of some assistance.

**Mr. Sterling:** I think that your work is important in terms of that anyway. Thank you.

**Mr. Chairman:** I thank you all for coming here today and making your presentation. We will certainly be able to go back and look at it in some detail. We thank you for taking the time to set out those views and we will certainly consider them.

**Ms. Castrilli:** Thank you very much.

**Mr. Chairman:** I would now like to call upon the representatives of the Toronto Jewish Congress. I will ask Mr. Lenkinski, who is chairman of the social policy committee of the congress, to introduce his colleagues. Perhaps we could come to order.

I apologize for the lateness of the hour. We do want to make sure we give you every consideration and make sure that we understand your concerns and issues. Perhaps, Mr. Lenkinski, you could introduce your colleagues and then proceed with your presentation.

**Mr. Lenkinski:** Thank you, Mr. Chairman, ladies and gentlemen. On my right is Les Scheininger, who is the past chairman and a member of the social policy committee, past president of the Jewish Family and Child Services and an officer of the Toronto Jewish Congress. On my far right is Rupert Shriar, who is the associate executive director of the Toronto Jewish Congress. On my left is Randy Spiegel, who is the social planning associate of the Toronto Jewish Congress.

Let me start off by apologizing for Mr. Rosenfeld who cannot be with us today. He is the president of the Toronto Jewish Congress and signed this submission.

#### TORONTO JEWISH CONGRESS

**Mr. Lenkinski:** I want to start off by saying that we appreciate and thank the committee for the opportunity to present our views on the accord that is before you. This submission is before you on behalf of the Toronto Jewish Congress. It will be followed later in the month by a submission of the Canadian Jewish Congress which will address specifically a number of issues that I am not going to touch on, although some of them are in this brief by way of support of the views of the Canadian Jewish Congress in relation to appointments to the Supreme Court, in relation to duality and distinctiveness, in relation to all the equality rights that are contained in the Charter of Rights, which some people maintain are somewhat put in question by the language of the amendments.

#### 1210

We want to concentrate on two items, very briefly. One is the question of immigration, because of our vital interest in that area, and the other is the issues related to social welfare concerns.

As far as immigration is concerned, we concur in and join with the position outlined by the Canadian Jewish Congress that the government of Canada should have the whole jurisdiction in provision, reception and establishing of standards of immigration, of who is to be permitted to enter into the country. However, the integration services, as they are left with the provinces, are subject to specific agreements that the provinces, on the basis of the amendment, are to strike with the federal government in this regard.

We just want to state that our interest in that area is immense. We would like the province to take note, just looking simply at statistics, that about 50 per cent of the total immigration figures into Canada are accepted by the province of Ontario. I think Ontario has an immense concern in, first of all, settling, servicing, providing education and the whole gamut of problems facing immigrants when they settle in a new culture and a new country.

Turning now to the social welfare concerns that we have, I am going to read this part of the submission. The Toronto Jewish Congress is one of the major voluntary sectarian agencies in the greater Toronto area. We are concerned about the lack of clarity surrounding sanction and financial



compensation to provinces opting out of national shared-cost programs. It seems apparent that if a province conducts programs or initiatives "compatible with national objectives," sanction and compensation will be given, even if the programs or initiatives lack similarity to the national initiative. This type of semantic manipulation could deny citizens of Canada social services intended to strengthen their ability and vigour.

We are likewise concerned that understood, accepted and expected social policies and developments since the Second World War may be at risk. The amendment in its current form reflects difficulties in maintaining comparable programs and services across the country. New national initiatives will find themselves most immediately affected. Similarly, the amendment lacks clearly delineated standards expected of shared-cost programs, an apparent departure from those expected under the Canada assistance plan.

Should the federal government propose a social welfare program with the intent of uniform benefits, the proposed amendment provides for the likelihood that the initiative will dissolve into different mechanisms with different conditions, perspectives and thrusts, with no opportunity for portability. The ultimate results are the establishment of programs far different from those originally intended. Further, the federal government is stating at the outset that it will reward this behaviour.

The current amendment allows for policies of accessibility, eligibility, standards and thrusts of service to differ so vastly from province to province as to inhibit mobility. For example, Ontarians currently covered under the province's health insurance scheme could be inadequately covered should a medical emergency occur while out of the province. Individuals will now be required to consider additional costs for private upgrading of their current policy, face the possibility of incurring private medical expenses, or remain at home avoiding any risk of catastrophic expenses, before making a travel decision within the boundaries of their own country.

A specific example of potential difficulties is exemplified by the recently announced federal funding initiative in support of child care. The principles, i.e., criteria that must be observed, to which provinces were formally required to conform, are now being replaced by "compatibility," i.e., capability of existing alongside our system. Power and intent are distilled. There is no common denominator, no principle of comparability to tie the social services fabric together.

The province of Ontario, on its own initiative, is effecting a substantial child care package, including the commitment of considerable funds for the program. Several issues remain in question and demand further consideration. While no support or sanction is intended, it is an unknown whether the federal funds to be expended for child care will be added to enrich and expand the current provincial initiatives or be absorbed towards the costs already committed by the province.

Given the current inadequacy of child care spaces, it is our hope that the Legislature will respectfully recommend that the federal funds be used to augment the current initiatives in this area. In addition, consideration must now be given to what the long-term impacts of provinces uninterested in publicly supported child care, or those supporting for-profit child care, will be across the country.

In conclusion, there are several concerns arising from the 1987 constitutional amendment. This submission is forwarded with the hope that substantive consideration will be given regarding the philosophical, practical and political base on which the accord was proposed. The possible negative consequences the amendment in its current form may have on Canada demand serious public debate and attention.

**Mr. Chairman:** Thank you very much for zeroing in on several specific issues. As we said earlier today, some of these are ones that we have not spent as much time on, up until this point, so it is most helpful to the committee that we can try to look at those more closely.

**Mr. Offer:** I would like to thank you very much for your presentation. I would like to zero in on your concerns with respect to the spending provision. This morning we heard some concerns also revolving around that particular section. What I would like to get from you, if I might, is an expansion of your concerns with respect to that particular amendment in the agreement dealing with spending provisions. How do you see that it might impact on provincial programs?

**Mr. Lenkinski:** I think the best thing is by way of an example. The example is health care. The province of Ontario entered into the national scheme quite late. While the language in the Constitution at that point was not clear, it was not as specific as it is in the present amendment, and the present amendment provides for a province to opt out of shared-cost arrangements in provision of such services if the province establishes a problem that is "compatible with the national objectives."

What that means is unclear. It requires tremendous definition and when the province goes in to finalize the deal, it is our intention to draw it to your attention so that you can discuss it with your federal counterparts, not to be faced with a myriad and patchwork of social programs across the country that are going to seriously impair the quality, the access and what we generally call the quality of life from province to province, from place to place.

**Mr. Offer:** Carrying on on that point for just a moment—and I know you realize that this is dealing only in areas of exclusive provincial jurisdiction; I know that is a given—it is my opinion that this particular section does meet a growing need in this country, and that is, a clarification that the federal government can enter into with respect to shared-cost programs—and I think section 106 does that in terms of areas of exclusive provincial jurisdiction—and also give to our provinces the right to opt out as long as they provide a program compatible with the national objectives, which would address the provinces' particular particular concerns; a recognition that the services, for instance, which you provide in Ontario, have different stresses, different needs, different demands from the services provided by an organization such as yours in Alberta, British Columbia, or wherever.

This particular section adds a flexibility which was not there before, so that these particular needs and concerns might be better addressed in a more effective and evolving Canada.

1220

**Mr. Scheininger:** I think there is a recognition with respect to a number of points that you have made. Our concern is more of a universal concern. We recognize the need to provide for the regional disparities that exist within this country and we recognize also that this section deals with only those shared-cost programs that may be within the exclusive jurisdiction of the province.

Our concern is, first, with respect to the lack of clarity in the wording. The wording, as Mr. Breaugh has already indicated in a previous submission, is subject to interpretation by the courts and, obviously, other individuals. We try, and we attempt to the best of our abilities, to clarify wording so that the interpretation may be made on more narrow grounds than allowing a chaotic situation. We are concerned about the lack of clarity in the wording, especially the words used in the amendment to the effect, "compatible with the national objectives." We are concerned that those words may be interpreted

in a wider sense than may be intended or understood at this point in time. So the wording is of concern to us.

Also, we are concerned that this particular amendment may, in fact, be counterproductive in that it may discourage the initiation of various national shared-cost programs, in that there may be, in fact, a lack of accountability when you use the vagueness of these words, a lack of definition in the programs and in the long run, over a period of time, the federal government may be discouraged in initiating these types of national shared-cost programs that are within the exclusive jurisdiction of the provinces.

We see it as being important that the federal government be encouraged as much as possible to free up funds for those programs that we feel, on a provincial basis and in terms of our community, to be important. We do not want to have anything, if we can avoid it, that would discourage, over a period of time, the provision of funds for these vital programs.

**Mr. Offer:** I do not know if I share that particular view that it would be a discouragement. I do not see that. I see this as a clarification of federal jurisdiction in this particular area. I see this as giving a flexibility to the provinces, and I see this as giving the different social agencies in the examples which you brought forward another place to input concerns as to what these particular programs ought to be. No longer will you have to sit back and listen while the province carries out a federal program of cost sharing, but you can also now input to the province as to why a particular program should be altered, still keeping within the national objectives.

That is my point, that it provides to you an even greater place to input your concerns with respect to the services that you provide. I am sure, as we proceed with this particular committee and hear other persons dealing with this particular section as well as others, we are certainly going to be grappling with those concerns.

**Mr. Eves:** Do you have any specific recommendations with respect to possible changes in the language of the accord? For example, the first group we heard from this morning was the Social Planning Council of Metropolitan Toronto. They were concerned about the same section, section 106A, but they did not go so far as to say that they thought the section should be changed. They thought that perhaps support, pending clarification of its provisions, might be reserved by the province, by this committee. They were looking for an interpretative document that could be



concluded, they say, up to two years subsequent to the accord. What would your approach to that be?

**Mr. Lenkinski:** I do not think that you can require a voluntary organization such as ours to have access to resources and to specialists to be able to come up with language that would cover what we want and also be acceptable to 11 governments across this country.

We all realize that this thing is a product of very intense, very hot, sometimes into-the-night negotiations between these various governments in order to come up with the deed. What we intend with our brief is to voice our concern, to alert the legislators in the province that the concern we have is valid. It impinges upon the delivery of services that we depend on and the quality of life in our province. We ask you, as legislators in this province, to be particularly careful that the definition of these programs and the parameters of the provision of these services do not water down what would be a useful net of social services that would benefit the province.

**Mr. Eves:** I understand that. I was not asking you to give me a written definition of what you think section 106A should be. I was just asking if you thought that this could be accommodated without actually amending the Meech Lake accord. I think that you have indicated to me in so many words that may be possible.

**Mr. Lenkinski:** You started out by saying that this is within the purview of the province. Then the onus obviously is on provincial legislators to make certain that the definition you ascribe to all of the programs here is one that would do two things: one, it is meeting the criterion of accountability to the federal government for the money it provides; and two it is being done to the benefit and advantage of the citizens of our province.

**Mr. Breaugh:** I wanted to pursue a bit some of the concerns that I would share on the provision of social programs. It is not that any of us are opposed to the idea of shared costs or setting of standards or negotiating how a service is provided. In Canada that is pretty much the way we do things.

I think what concerns us is that the wording of certain sections of this act introduces some new language to us, and we are a little apprehensive that we can continue to operate in the way we always have. Specifically, the social planning council in its brief made the point that there is apprehension here, and rightly so, and that perhaps the onus should now go back on to the governments to clarify exactly what they meant

by that and that perhaps it would be a useful exercise to set our civil servants to write out a further interpretation of exactly what was meant there. Then maybe, if we could see it in that context, we would recognize that, yes, this is the way we build roads, provide hospitals and provide university services. We have always done that.

I think we should recognize too that even though medicare has been in operation in Canada for some time now, we are still arguing over the provision of services in different provinces and whether an Ontario health insurance plan card is going to do me any good at all at a hospital in Montreal. So we have not quite perfected the system yet.

But it did strike me that the social planning council in its presentation had identified the nature of the problem, which is clarity. We do not know what this accord means. Are we changing gears here? Is there a difference in the way we operate? I would like to get your response to their position, which was essentially: "We're not prepared to say no to this thing; but there are a whole lot of questions that must be answered." People must provide those answers, frankly, because many of the social services in Canada are provided not by governments directly but by other agencies that are an arm's length away, and they have to know if there is a change in the rules here.

## 1230

**Mr. Scheininger:** I think, in a nutshell, we are in the same position as the social planning council, and if there is a message to be received from our brief it is that these amendments, particularly those dealing with the shared-cost programs, lack clarity.

We are uncertain, and you have expressed it also, Mr. Breaugh, with respect to the ultimate effect of this particular amendment. Mr. Offer had one interpretation of the possible effect. I may have a differing interpretation in terms of the long-term effects of section 106A. I think that is illustrative of the problem that we face. We do not know how this will impact upon the receivers of the services, and that is what we are concerned about: how the money and the services will ultimately flow to those people who require the services and the money.

The point that has to be made, and we agree with the social planning council, is the lack of clarity in the proposed amendment. I am not sure, however, whether interpretative documents would be sufficient in terms of how the courts may interpret section 106A. I remember what I

thought the Charter of Rights was supposed to mean, and I read the interpretative documents that came out contemporaneously and subsequent to the Charter of Rights. I am now in a different position, compared to what I thought I was in 1982. I do not think, it would be my respectful submission, that interpretative documents would be of great assistance when we are dealing with a constitutional document. I raise that concern to you.

**Mr. Breough:** Let me just raise one final thing that I would like to get your reaction on. I think one of the things that concerns me is precisely that this is a constitutional document. We are used to the notion that we all decide we like medicare, we pass an act somewhere and it is supposed to happen; then our civil servants negotiate how much money this is going to cost, who is going to pay what share, how we provide the service—all of that. That is traditionally the way we have done things in Canada—almost everything, in fact.

Now we introduce a Constitution, and people are going to go to court and they are going to say: "I don't care whether your provincial government wants to negotiate the provision of this service, I have a constitutional right to it and I am going to go to the Supreme Court of Canada and they will say yes or no." Monday morning the judges will make a decision public and Monday afternoon the provinces will provide services in a different way. That has just happened to us.

We are into uncharted waters here, which is causing me some concern. Where I normally would say, "Well, I'm not really worried about the words that were used in any section of the Meech Lake accord," now I have to remind myself that this is a little different ball game than I am accustomed to playing.

Normally—we are Canadians—we would have a conference on this. We would set up a royal commission. We would all go to Ottawa, or Victoria or Charlottetown. We would discuss this for a while and we would negotiate our way out of this mess. Now someone else may have a legal right to go to court. A lawyer and a court judge may make a decision that throws all of the rest of this carefully thought out process out the window.

That is the anxiety that I would share with you and with the social planning council about this kind of thing.

**Mr. Scheininger:** I think the point has been made, and it is the same point we are making, that there is a necessity for precision in language

when you are dealing with constitutional documents.

**Mr. Chairman:** Miss Roberts has one last, quick question.

**Miss Roberts:** I hate to agree with my friend, but we all have the same anxiety I think.

**Mr. Breough:** It happens every once in a while.

**Miss Roberts:** There is very little, as you have just indicated, that you can do, even in the clarity of the language; it will be interpreted by a court. Once we have set up our Charter of Rights and Freedoms, once we have gone on the path towards a Constitution, our entire way of looking at how we as individuals react with the government may have changed, and certainly has.

I think what we are trying to do now is to determine how we can set up a process which in the long run, as my friend has indicated, will come to the consensus, come to the agreement, come to the language that is going to be interpreted, sooner or later, no matter what we do; even your interpretive documents are going to be interpreted by someone.

Do you have any suggestions that might help us in the development of this process?

**Mr. Scheininger:** Obviously, we had difficulties with respect to the initial process. That has been mentioned before and it has been mentioned on numerous occasions. I am sure that many delegations before you will express similar concerns. The haste with which the accords were developed and the haste with which they were signed was of great concern, and still is of great concern to us. I think that haste has resulted in a certain lack of clarity in the language.

When we talk about process, though, I think the province has done something by the creation of this committee, at least to alleviate or to attempt to alleviate the problems in process. I hate to throw the ball back in your court, but I would submit that if the province is serious in terms of giving careful consideration, is serious about listening to these delegations and is serious that it can be swayed at this point in terms of the accord, then the process is here.

With respect, I think it is a responsibility of this committee and of the committee that will be or is already established in Manitoba to also consider the accord, and I think it is a responsibility of the Legislature ultimately, if you deem that there are such concerns that merit a re-evaluation that the Legislature appropriately debate those concerns.



I suggest that we have accepted the status as it now is in terms of the process. The Toronto Jewish Congress is—

**Miss Roberts:** You are limiting yourself to a document, to an accord. Our Constitution is going to go on a lot longer than I live, the Lord willing. I would like you to address that as well, not only this accord but also what is going to happen, because each year we are going to be meeting.

**Mr. Lenkinski:** Again, we consider the process that the Legislature of Ontario has established a forum for people like ourselves who are involved in the provision of these services. We represent 12 agencies providing a variety of services, most of whom are obtaining funds from government sources in the provision of these services. You provided us with a forum where we are giving you concerns.

This is a process that does not finish with the signature on a document; it is a process that will be continued for as long as we have some access

to influence the legislators, not only about the dry language of a document but about the practice and how that practice is reflected in the provision of the services. I think the obligation of the province, of the community and of society will probably bring the desired results.

**Mr. Chairman:** Thank you very much for being with us. I think particularly those last comments are very helpful, because that is an issue we are grappling with as well. As I mentioned before, you have touched on some issues that for us, as a committee, are ones we have not gone into in as much detail as we have this morning, and we are grateful for that. Thank you again for coming here and meeting with us.

**Mr. Lenkinski:** Thank you for the opportunity.

**Mr. Chairman:** We will stand adjourned until two o'clock.

The committee recessed at 12:39 p.m.

## AFTERNOON SITTING

The committee resumed at 2:04 p.m. in room 151.

**Mr. Chairman:** I call the committee to order. Our first witnesses are the representatives of the Ontario Confederation of University Faculty Associations. We welcome you here. I will call on Professor John Starkey, the president of OCUFA, to introduce his colleagues. Please proceed with your presentation and we will follow it with questions.

#### ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS

**Dr. Starkey:** Thank you, Mr. Chairman. On my extreme left is Helen Breslauer, the chief researcher of our organization, and on my immediate left is Howard Epstein, our executive director. It is he who will be making most of the presentation this afternoon, having particular expertise in this area.

By way of introduction, I would like to make a couple of comments. You have before you a copy of our brief. We make it very clear at the outset that we are addressing only two issues of the Meech Lake accord, and these are two issues which, in fact, we believe impact or potentially impact upon post-secondary education.

The first is concerned with the locus of governmental power in dealing with post-secondary education. Specifically, we are concerned with section 106A, which means or might mean—we are not sure—that the relative roles of the provincial and federal governments may or may not change with respect to post-secondary education. The second issue is the threat to equality rights. Again, here specifically our concern centres upon the groups which are excluded under clause 16 and those groups which are named. This does not ensure that the “distinct society” clause, clause 2, will not affect women’s rights.

It is on these two specific issues that we wish to make our presentation this afternoon and on which I will ask our executive director to speak.

**Mr. Epstein:** I think we are very conscious of coming before you today, particularly with respect to the first point, advocating a view of the proposed Meech Lake accord that may not be consonant with several others that you have heard. That is to say, I think there is a fairly common view that has been expressed with respect to the accord as a whole, and sometimes

with respect to the proposed section 106A of the Constitution, that in general there is a strengthening of provincial powers as over against the federal government.

That is a matter we wish to question, not with respect to other sections of the accord—that is, not the matter of appointments to the Senate or to the Supreme Court, or matters of amendment, or matters of bringing in territories as provinces—but confining ourselves to the proposed section 106A. We wish to question whether that is an accurate interpretation; that is, whether it really does represent a shift of powers to the provincial governments.

At the very least, we are of the view that section 106A is extremely ambiguous. We also are rather inclined to think that there may be good reason to read it as going so far as to represent a shift of powers in the other direction. We have serious concerns on both counts; that is, if our interpretation, if the suggested interpretation of a shift to the federal government is correct, we have some concerns. If, however, it is to be seen as ambiguous—which we think is the very least that can be said about that—we are of the view that the ambiguity has to be characterized as an egregious ambiguity.

If that is the case, we think that in the end it probably does not behoove the province, along with the other provinces and the federal government, to amend our Constitution in a way that introduces such serious ambiguity. We are concerned that in the end, egregious ambiguity is egregious error. If that is the case, if that is the test you are proposing to apply when you write your report, you might consider ambiguity in a somewhat more serious light than perhaps you previously have been inclined to think of it.

Let me remind you of what it is that the proposed section 106A has to do with. It has to do with what is called the spending power proposal. Our view at the moment is that the existing state of constitutional law has been that in areas that are exclusively within provincial jurisdiction, quite obviously the federal government is not supposed to be passing legislation and vice-versa; that is, the provinces are not to legislate in areas of federal jurisdiction.

On the other hand, it has been well recognized for any number of years that the federal government can, if it chooses, use its money power, its spending power, to give money either to the provinces or to institutions which are



within provincial jurisdiction. That has not been regarded as unconstitutional. The tricky question, however, becomes the status of any actions by the federal government which purport to transfer money either to provinces or to entities which are regulated by the province and, at the same time, attach conditions.

We have seen this emerge as a so-far unchallenged mode of the federal government dealing with the provinces in matters of health, education and welfare, most typically I think with respect to health in the Canada Health Act, which provides a model which has not only been in place for a while, but which has been touted by many as a potential model for the way the federal government might go with respect to higher education.

You may not recall, but at the time of the fight over Ontario's extra billing legislation, it was announced by the Canadian Medical Association and the Ontario Medical Association together that they were proposing to challenge the constitutionality of the Canada Health Act. I myself remembered this only from press reports at the time. It seemed to have disappeared from the public agenda, but I did track down what had happened to this threat of a lawsuit. Indeed, there is such a lawsuit outstanding. I spoke with representatives of the Ministry of the Attorney General of Ontario who are engaged in the preliminaries of this lawsuit. There is a challenge to the constitutionality of the Canada Health Act which, although it has not been a matter for much public discussion since the time of the banning of extra billing, is none the less an issue that is still alive.

We tend to think there is some substance in the challenge, and the challenge is precisely on that point that I said had hitherto not been dealt with by the courts; that is, the question of whether the federal government can, in giving money to an area which is within provincial jurisdiction, attach conditions. We are concerned not, of course, about the health area, which is not our area; we are concerned whether this will provide a model for the higher-education area.

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If the case is that the attaching of conditions with the transfer of money by the federal government through the mechanism of legislation is unconstitutional in health, it will probably also be that for higher education. If that is the case, however, the proposed section 106A will, in essence, mean that the doubt about the federal government's power to do that will be removed, because what section 106A does is say that in

matters of essentially health, education and welfare it comes down to the federal government being able to transfer money to the provinces and attach conditions.

True, the province can opt out; the province can be reimbursed if its programs meet the federal standards, the federal objectives. None the less, what that clause does overall is purport to allow the federal government to clearly attach conditions to the transfer of moneys, which has never been dealt with as a question before and which is of very dubious constitutional status.

**Mr. Chairman:** Can I just clarify that? The Canada Health Act case you are referring to, is that still before the courts?

**Mr. Epstein:** Absolutely. There has been no judicial determination on it at all, even at the lowest level. The case is a preliminary case, although it was filed in May 1987. At this point, so far all that has happened is that the opening documents have been filed by the Ontario Medical Association and the Canadian Medical Association as plaintiffs, along with some individuals as plaintiffs, and the federal Minister of Justice and the provincial Attorney General (Mr. Scott) have filed their responses and the process of discovery is in the works. It has not proceeded to court yet at all, but all the preliminaries are being done.

My point is, though, that something that had never been challenged before—because everyone who was in receipt of the funds was, up until that point, happy to take them and not about to challenge the constitutional structure, obviously—ran into a snag with respect to the banning of extra billing and the doctors were prepared to take it that far.

We are not here to discuss the extra billing, of course. That is not the issue; the issue is the model of the Canada Health Act.

We are concerned that there may be this shift of powers that is of some concern to us, particularly if it is seen in an overall context of a movement towards federal government steps with respect to higher education. On pages 5 and 6 of our brief, I think we identify what seem to us to be a number of significant moves by the federal government with respect to higher education over the last decade.

However, it is really the question of ambiguity that, in the end, we think must be a concern for this committee. That proposed section 106A is full of phrases which are obviously going to be subject to judicial determination, such as, what is a "program or initiative"? What does "compatible" mean? What is a "national objective"? All of

those phrases introduce such a serious element of ambiguity that we wonder what it is the provincial government thought it was signing when it put into place section 106A.

We wonder whether the intention was to strengthen federal powers. Was the intention to strengthen provincial powers? Was the intention by a group of premiers, many of whom are lawyers, to stir up litigation? It seems to me that there must be an answer to that and, yet, in the inquiries we have made of the advisers to the Premier (Mr. Peterson) on intergovernmental affairs, or the opposition parties, we have not really received any satisfactory answers as to what it is they actually thought they were doing. We would rather like to hear, in the report of this committee, what it is the committee thinks was being done.

This is the crucial issue for us with respect to our area, which is education, in this case higher education: what it is the committee thinks this clause actually accomplishes. It is far from clear and, as we say, it should be characterized as a matter of, to take up the Prime Minister's words, "egregious ambiguity."

If I could move, however, to the second part of our submission, it has to do not with section 106A but with a matter that I am sure has been brought to your attention before. It is the question of the way the equality rights section of the Charter of Rights and Freedoms as it exists right now—section 15—and particularly the interplay of section 15 with section 28, which purports to guarantee sex equality rights, will be affected by the "distinct society" clause.

I think the issues here have probably been laid out for you on a number of occasions. They are quite clear. It is the problem of whether in introducing the "distinct society" clause and then saying it is not meant to affect the rights of aboriginal peoples, it is not meant to affect certain other rights, at the same time, by omitting to mention the other equality rights, particularly those of women set out in section 15 of the charter, the intention was that the clause could be used to override that.

That is not a fanciful suggestion. It has been seriously debated by constitutional scholars, two of whom have written long guest editorials in the *Financial Post* this past fall: Dean Lederman—perhaps you have seen his paper—and Professor Beverley Baines. Perhaps you have seen her article as well in response to Dean Lederman's.

We take the view again that there has been such good work done and a lot of effort put into establishing the equality rights, and especially

the specific inclusion in the charter of nondiscrimination on the basis of sex, that it would be very unfortunate if, either deliberately or through ambiguity again, there were to be a threat to those rights. Ambiguity will inevitably lead to litigation and delays and will also have a chilling effect, in our view, on what is a serious and important social movement.

We are inclined to think that, again, the exclusion of the rest of the equality rights creates a serious ambiguity that we should characterize as egregious. Given these two points, we are inclined to repeat to you again—that is the point about the egregious ambiguity with respect to section 106A and the egregious ambiguity with respect to the equality rights—that it would be well within your mandate to conclude that there is egregious error simply on the basis of ambiguity because we cannot imagine why it is that you would want to write such ambiguity into the Constitution.

We would welcome any questions.

**Mr. Chairman:** Thank you very much. It is interesting; I think today will probably be deemed section 106 day. It is good, because I think it has really helped us to focus our thoughts on that. Again, your focus is different from the others we heard this morning; not necessarily in terms of concerns about it, but I think your perspective is a different one.

**Mr. Allen:** I appreciate the fact that the Ontario Confederation of University Faculty Associations has come before the committee in order to present its views on the Meech Lake accord and to do so from the perspective of problems that it might entail for the education sector, which is lodged, of course, primarily under the provincial powers in the British North America Act but which has been impacted over the years very heavily by federal spending.

If I might, I think that you have perhaps left the case a little bit abstract and I wonder if you could bring it down to earth for us a little bit in terms of some scenarios that you see developing under one interpretation and under another with respect to section 106A.

For example, if in fact this does entrench federal power with respect to conditions made on shared-cost programs and federal spending—power capacity, is that, in your view, good or bad from the point of view of the education sector or, to put it from the other side, what is there to protect at the level of provincial initiative and provincial power that makes it important that this not happen? Or, by the same token, is it important that it do happen?



**Mr. Epstein:** Let me give you one possible scenario. If the interpretation that section 106A will strengthen federal powers is correct, and the federal government were to exercise the powers in the area of higher education as it has done under the Canada Health Act, one possibility would be as follows.

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The federal government could say that the money it now transfers to the provincial governments for use in higher education would come only on condition that the different provinces established programs in the universities with set numbers of enrolments in different programs. Hence, they would be able to say, out of Ottawa, that nationally there would be places for 50, 100 or 500 petroleum engineers across the country; there would be places for 5,000 sociologists; there would be places for 15,000 schoolteachers. Those kinds of possibilities at that level of detail of planning could attach to the transfer of moneys.

The threat that would attach is that the money would not be transferred to a province that did not comply. If a province wished to opt out, it would have to have something that was compatible. If that word was meant and interpreted as a strong word, the provinces would have to match the federal central planning for the labour-market side of the economy. It seems to me that one might well question whether this is good for higher education or good for the economy.

**Mr. Allen:** I gather you are not contesting federal spending power per se and you are not raising a question about that. As you know, one of the major problems with federal spending power without attached conditions has been that in the higher-education sector, dollars have sort of trailed off in all sorts of other sectors of provincial spending and have not been kept under the control of objectives or standards, which of course has been the problem on the other side.

Your scenario is a highly detailed intervention from the federal objective as distinct from a broadly framed objective. Is your concern really between those two poles? Is your concern about specific federal guidelines, highly detailed, which would try through the university and post-secondary spending, for example, to seek to accomplish manpower objectives and economic objectives as distinct from educational ones, or is your concern that there be any objectives at all?

**Mr. Epstein:** We are certainly not objecting to the existence of the federal spending power. It is well recognized that the federal government has a constitutional right to transfer money in aid of

provincial programs. Indeed, we think that the Charter of Rights entrenched the obligation of the federal government to do exactly that through equalization payments. The existing section 36 of the charter simply says that the federal government has to transfer moneys around so that public services can be at a reasonably equal level. Section 106A seems to us to be a bit of a backing away from that.

The example you gave, of money transferred for higher education being used for other, noneducational purposes, I think does not really deal with the question of federal objectives. The money should undoubtedly—and it could well be proper for the federal government to say this—go for a particular purpose in the sense that it should go to education or should go to health. The question is the level of detail. It is certainly true that since the federal government did not say in the established-programs financing legislation that the money had to go to higher education, although that was the context of the negotiations, some provinces have actually used the money, as you say, for other purposes.

The question is indeed the level of detail. I think what section 106A contemplates is that programs with objectives, which sounds like a much more detailed matter than simply saying money should go for education or money should go for health, will lead the federal government possibly into wishing to put in place a great deal of detail.

Certainly, the example I gave was one which posited a very activist federal government. Yet even if you come at some removes back from that activity, one could imagine a federal government getting into programs with objectives that were, although not so detailed, none the less very interventionist. It certainly is a continuum, I would certainly agree.

**Mr. Allen:** Just a final observation: Professor Hogg, when he was with us, gave us the opinion that probably the most you can say about this clause and about national objectives was simply that the money had to be spent on what it was transferred for. I do not know whether that gives you a sense of relief or not, and there are probably others who will say otherwise.

**Mr. Chairman,** if someone does not come back to the equality stuff, I will, but I will yield the floor for the moment.

**Mr. Chairman:** Just briefly, as a followup to that particular question—again I want to be clear here—your concern with section 106A is not that you necessarily want the federal government to have a much more specific role; in fact, you

would have a certain concern if that really did not get too specific. I think one of the views that have been expressed on this is that while this deals with provincial areas of jurisdiction, some people feel this is going to limit the federal government in a broad sense from being involved. But you would like it made clear so that if you are dealing with the province of Ontario on whatever the educational or post-secondary issue might be, when the funds are transferred—and I think it is elsewhere in your brief—you want a certain freedom for the university in determining itself where and how those funds might be spent.

**Mr. Epstein:** I think you have understood our position quite well. I would say that university autonomy is certainly one of our main concerns. We do not purport to speak to what is best in the areas of health and welfare. Our comments really are confined to observing what we think the impact of proposed section 106A would be on the higher-education area.

**Mr. Chairman:** Thank you.

**Mr. Epstein:** Can I just say something about Professor Hogg? I certainly have great respect for Professor Hogg and his opinions. On the other hand, I have also just been reading court judgements in which his texts have been cited by judges in the midst of saying they did not agree with him.

**Mr. Chairman:** Lawyers and economists.

**Mr. Eves:** I too would like to congratulate OCUFA on a very well put presentation. My friend Dr. Allen has addressed your concerns about section 106A. I would like to address the second issue that you raise, and that is women's equality rights.

I quite agree with you—in fact, I could not put it more succinctly myself—that there is at least some ambiguity raised by the way the accord is drafted as to whether or not these rights are going to be affected, although there are others who obviously disagree and argue about sides. It is easy to argue about sides, and there are indeed some very talented people on both sides of the issue; however, I would think that if we are going to be entrenching this in the Constitution of Canada, it is only common sense to clear up whatever ambiguities we have now, if possible.

When Professor Baines was here before us—in fact, she was one of the very first witnesses, if not the first witness, we heard in this committee—she suggested that she would go so far as an all-encompassing amendment to make sure that all rights and freedoms as defined in the Charter of Rights and Freedoms would take precedence

over the accord. I presume you would agree with her philosophy in that regard.

**Mr. Epstein:** Absolutely. It seems to me a very sensible suggestion.

**Mr. Eves:** Thank you.

**Mr. Elliot:** I too would like to thank you very much for coming and giving us such a nice overview so quickly, so that we have some time for questions in the short time we have.

I respect the problem you have with respect to retaining the autonomy of the university. I feel as strongly as you do about that. As a committee member, I would really appreciate it if you would take this opportunity for a few minutes to expand on that, and perhaps suggest to us how section 106A might be modified or how some sort of guidelines might be put in place so that the autonomy of the university community might be retained, so that both provincially and federally you are not under the gun all of the time to be accountable in such a way that you lose the autonomy at the university.

**Mr. Epstein:** It is difficult. It is not impossible, but of course it is difficult. That gets me back to the point I made before about not wishing to attempt to speak on behalf of health and welfare issues, so that any modifications we can suggest are not intended to affect what they might see as desirable in their areas and what you as legislators might think is an appropriate division of powers with respect to those areas.

With respect to higher education, we have not worked out a text for how section 106A might usefully read. It might usefully not exist; that is, it might simply be left out with respect to education and we could simply live with the constitutional status quo at the moment.

**Mr. Elliot:** I would like to ask Professor Starkey if he might have a comment on this too from a faculty point of view.

**Dr. Starkey:** As Howard just said, we are very much aware of the fact that section 106A affects more than education. I do not think we want to get involved in trying to rewrite a clause now, in the cold light of day, which the Premier and the Prime Minister were not able to write in the heat of the night.

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It seems to me that from the point of view of education, it is not well thought out the way it is worded, because it really does not address the post-secondary education issues. For instance, on the face of it, it seems as though it is only going to affect new transfer payments. Of course, one can bring education in by simply



rewriting the current transfer-payment legislation, and then it will apply. If that was not the intention, then education is indeed excluded.

Maybe it does what Howard has suggested might be an acceptable way: exclude education. On the face of it, it does, but we are not sure that was the intent of the people who wrote it. Again, I guess we come back to the ambiguity. Tell us what you think it means, and then I think we can respond as to whether that is good and how it could be improved.

**Mr. Elliot:** So it would be a lot better, in your mind, if we clearly stated that it is just new programs and that this automatically excludes educational considerations.

**Dr. Starkey:** I think that would clarify the situation for us, certainly. As our brief points out, we are not particularly thrilled with the status quo, but also we are not pleased with any changes that might come out of this, especially since we do not know what the changes might be. If we knew what the rules of the game were going to be—i.e., that this does not apply to higher education—then I think we would be in a much better position to respond and to do what we in fact do anyway, and that is to lobby the provincial government.

**Miss Roberts:** You indicated with respect to the status quo that the status quo is in particular a challenge that is now in effect that might do this in an even harsher way than you expect to get from the ambiguity that is here. Even if we do pass this, if that particular piece of litigation goes on, it might come out just exactly opposite to this, or it might refine it in some way.

**Mr. Epstein:** One of the possible results of the litigation that is now a challenge to the Canada Health Act would be to recognize that the federal government, if it transfers money for a provincial purpose, is allowed to attach conditions. That is certainly one possibility. When we look at that as a possible result, we are not enamoured of it, and yet it goes a little further, I think, than we were suggesting here to propose to you that you would want to oust federal jurisdiction entirely. We are not suggesting that.

**Mr. Chairman:** I would like to thank you very much for coming today and making your presentation. As I think we have all noted, there are some thoughts and ideas there that we have not heard before, particularly with regard to section 106A and the educational aspects. I find that a very interesting perspective and we are glad to have it.

**Mr. Epstein:** Could I make one final point? I would point out that although we of course represent the university sector of higher education, I noted that there are a number of educators who are members of your committee. There is reason to think that our concerns would not be confined only to higher education.

**Mr. Chairman:** Fair enough. I did not want to put that mantle on you as well. Thank you very much for being with us today.

I would ask the representatives of the Ontario Public Service Employees Union if they would please come to the table. If I might, once you are settled, I will ask the president, Mr. Clancy, to introduce his colleagues and we will then turn the microphone over to you. We will be in your hands. After your presentation, I know we will have some questions to direct to you. So, Mr. Clancy, if I might ask you to proceed.

#### NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES

**Mr. Clancy:** With me this afternoon, to my immediate left, is Larry Brown, the secretary-treasurer of the National Union of Provincial Government Employees. To my immediate right is Sean Usher, the director of research, education and campaigns for OPSEU.

The National Union of Provincial Government Employees, representing 292,000 employees, and of which the Ontario Public Service Employees Union is a component, welcomes the opportunity of appearing before you in your consideration of the Meech Lake accord.

Your committee's deliberations challenge the view that the accord is beyond the reach of criticism and amendment. The Constitution belongs to the Canadian people and we urge your committee and the Legislature to affirm their right of discussion, criticism, change and final approval.

The Ontario Public Service Employees Union, NUPGE component, represents over 90,000 public sector employees in Ontario, of whom about 65,000 are directly employed by the provincial government. The other 25,000 work in various public sector agencies and institutions involved in education, health and social services. Fifty-four per cent of our members are women.

Both as public servants and as citizens, we have a vital interest in the process of government and in the appropriate allocation of power as between the federal and provincial levels. The process by which this allocation is altered, in fact as well as in law, to meet changing circumstances

and needs is of no less concern to the members of our union.

Accordingly, the Ontario Public Service Employees Union, NUPGE component, is pleased to submit its assessment of the 1987 constitutional amendments known as the Meech Lake accord. We are not, however, intoxicated by the "spirit of Meech Lake" with which the drafters of that accord have celebrated its negotiation. In fact, we have the gravest concern about many of the substantive provisions of the accord.

We will begin this brief, however, by dissenting strongly from the process by which Canada's constitutional arrangements were so extensively modified in the first ministers' meetings last April 30 at Meech Lake and June 2 and 3 in the Langevin Block.

Following the constitutional process which culminated in the 1982 patriation of Canada's Constitution and the adoption of the Charter of Rights and Freedoms, a distinguished trio of participants and observers identified the need for an "adequately deliberate, open and democratic" process to be in place for any further constitutional amendments.

In our view, it would be difficult to conceive of the Meech Lake process as anything other than hasty, closed and undemocratic. Far from opening up the constitutional process since 1982, it is disturbingly apparent that the first ministers have constricted it and thereby diminished the rights of the people of Canada to participate in the making and remaking of the fundamental rules which govern the affairs of our country.

OPSEU does, of course, appreciate the opportunity to make this presentation to the select committee, and we indeed trust that our views will be given weight in your assessment of the Meech Lake accord with which you have been charged. Yet we are bound to emphasize that inviting comment on constitutional arrangements already finalized and signed in the course of a series of closed-door meetings of first ministers falls far short of the participation which should characterize the constitutional process in a free and democratic society. Indeed, the 1987 machinations of what Professor Bryan Schwartz has called "a cabal of first ministers" have unarguably given far less scope for public input into the constitutional process than we enjoyed during the discussions which led to the passage of the Constitution Act, 1982.

It is striking that the 138,000 citizens of Prince Edward Island were given an opportunity to vote on the proposed fixed link to the mainland, while the voters of Canada as a whole have no chance to

exercise their franchise directly on the Meech Lake accord.

This union's members are of course concerned as citizens with the manner in which our governmental system is modified; but they also have an attachment to democratic decision-making as union members. OPSEU undertakes a deliberate and thorough process of determining the members' wishes before sitting down to bargain collectively with the employer.

Those of us used to the demand-setting process within OPSEU find the haste, secrecy and elitism of the Meech Lake process absolutely unacceptable. Mr. Mulroney and the 10 provincial premiers struck their deal in a closed meeting at a Quebec resort before divulging its general thrust to the country and went on to change its provisions significantly in a private, all-night, horse-trading session in Ottawa's Langevin Block.

We have no hesitation in asserting that the way OPSEU negotiates terms and conditions of employment has far greater moral legitimacy and practical effectiveness than the 11-man huddle of Meech Lake.

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OPSEU strongly urges members of the select committee to reject the accord, both because of the unacceptable way it was negotiated with the provincial premiers, who have called upon you and other legislators to rubber-stamp it, and because of its array of substantive defects, to which we now turn.

OPSEU considers that there is much wrong with the provisions contained in the Meech Lake accord. But we are also dismayed that the document fails to propose much-needed improvements to the Charter of Rights and Freedoms. We therefore urge that the resolution before you be amended so as to initiate the process of strengthening the constitutional protections for individual rights in the two areas of freedom of association and rights to participate in the political process.

Despite assurances during the 1981-82 constitutional process to the effect that freedom of association encompassed the freedom of workers to organize into trade unions and conferred the right to bargain collectively and to strike, OPSEU and other unions have found this interpretation of section 2(d) of the charter rejected by the courts.

Chief Justice Brian Dickson was unable to carry the day with his argument that "freedom of association in the labour relations context includes the freedom to participate in determining



conditions of work through collective bargaining and the right to strike." Mr. Mulroney, who formerly earned his living by the practice of labour law, professes to respect picket lines and otherwise to support the rights of workers to organize, bargain and strike. Canada has indeed subscribed to International Labour Organization conventions which explicitly require respect for such rights.

We therefore call for the accord to be amended by defining freedom of association in section 2(d) of the charter as including the freedom to organize, bargain collectively and strike. Like all other charter rights, this would of course remain subject to section 1, permitting legislative curtailment where "demonstrably justifiable."

OPSEU has long campaigned to secure for our members the rights to full participation in the political process that are enjoyed by other Canadians. Members of this committee will be aware that Mr. Peterson's government pledged in May 1985, in another accord, to remove this long-standing injustice. You will also be aware that the law reform commission, to which the detailed consideration of the question was referred, reported positively as long ago as July 1986.

OPSEU hopes that provincial legislative action to confer political rights upon public servants will not much longer be delayed. But the slowness of the reform process in Ontario, together with the continued denial of such rights to federal civil servants and to our brothers and sisters in other provinces, argues for further constitutional adjustment. OPSEU is currently embarked on a court action to prove our contention that the charter does indeed confer full political rights on all our members as much as upon all other Canadians. But the foot-dragging we have experienced in this regard persuades us that explicit entrenchment of the right to participate in the political process in the Constitution is prudent. Accordingly, we suggest amending the accord to add a clear statement of that right to section 2(b) of the charter which protects freedom of expression.

OPSEU does not propose to offer a detailed analysis of the entire accord, but we feel that our interests as trade unionists and our concerns as Canadians with important aspects of national life require us to oppose several sections of the document. It is necessary to acknowledge at the outset that there is great uncertainty and disagreement respecting the actual meaning of many important provisions. The hurried and secretive process of negotiation evidently produced an

agreement which is shot through with obscurity, inconsistency and ambiguity.

The wording of a constitution is no mere stylistic concern. Critics have warned of the uncertainty created by the ambiguity and inconsistency of its language on many key points. Accord supporters have often acknowledged the linguistic muddle with what Professor John Whyte, the dean of law at Queen's, has called "the vacuous observation that the effect of legal language is always hard to predict and that we shall have to see what the judges make of the provisions."

For us as trade unionists, that just is not good enough. When OPSEU negotiates collective agreements, we strive to make them clear and precise so as to clarify rights and obligations for all contingencies. Of course, it is sometimes necessary for the meaning of clause umpteen in a particular situation to be determined by an arbitrator. But no sensible person would sign a collective agreement in which fundamental issues are left for subsequent determination by a third party.

Confusion is rife, for example, in the accord's treatment of national shared-cost programs. As students of this important area of governmental interaction are aware, we have no coherent categorization of such programs and indeed no statutory definition to apply. Now we shall need to figure out what is meant by quite fundamental parts of this provision of the accord, as we argue below.

After his exhaustive analysis of this provision, Professor Schwartz sums up the confusion very well when he says: "There is no bottom line here. There is only a betting line." And you pays your money and takes your choice in respect of so much else in the accord, such as how far its terms will modify the rights of women and whether they will affect those of native peoples.

We certainly acknowledge that there is an important role for the courts in interpreting constitutional provisions but we cannot accept that it was necessary for so many key elements of the 1987 accord to end up, as it seems likely they will, in arbitration. As one observer has commented, Canada's Constitution is looking more and more like the Income Tax Act, and we all know it is not the ordinary taxpayer who benefits from such impenetrable complexity.

The equality rights contained in the Charter of Rights and Freedoms, which came into effect only in 1985, are seriously compromised by this accord. While OPSEU welcomes the achievement of a constitutional agreement endorsed by

Quebec, we do not see that this gain needs to be won at the expense of the equality rights of important elements of Canadian society. We concede that the impact of this provision is open to argument, but when it comes to fundamental constitutional rights, OPSEU is adamantly against taking what former Senator Eugene Forsey terms "a leap in the dark."

The last-minute scramble to extend charter protections to some affected groups by providing that the accord does not derogate from the rights of native people or the multicultural community simply points up this defect. It is offensive to women and others whose equality rights are not so guaranteed for our Constitution to be distorted by a hierarchy of rights. OPSEU supports the Women's Legal Education and Action Fund and other women's groups in calling for the accord to be amended so as to state that nothing in any of its provisions affects any of our basic rights and freedoms under the charter.

Sexual equality rights have not yet been litigated extensively. They are already liable to restriction under section 1 of the charter, the "demonstrably justifiable" clause, and subject to suspension under section 33, the "notwithstanding" override. The courts have held some conflicting legislation—for example, the Bill 30 decision upholding the extension of full provincial funding to the separate school system—to be immune from charter review. It is patently wrong for the first amendments to the Constitution which follow enactment of the charter to put at further risk the equality rights of women.

The Constitution currently contains protection in section 15(2) for programs of affirmative action to remedy the condition of disadvantaged groups. Yet such initiatives, which include equal pay for work of equal value and other forms of long-overdue employment equity, remain subject to the "notwithstanding" provision. OPSEU recognizes that emergency circumstances which could warrant the use of that means of overriding charter provisions might arise at some time in the future, but we are concerned that the accord may further limit, instead of broadening, the routine application of the Charter of Rights and Freedoms.

The accord's recognition that Canada is a country characterized by linguistic duality does not go far enough in acknowledging the realities of our country. We believe it is appropriate to state in section 2(1) of the accord that Canada is a multicultural society and also to declare that our aboriginal peoples constitute a fundamental characteristic of the country. While such declara-

tions would not in themselves add to existing individual rights, they would powerfully add to our symbolic commitment to respecting the contribution of ethnic minorities and of the original inhabitants of our land.

Al Johnson, a distinguished public servant who has worked at the highest level in both federal and provincial levels of government, has concluded that the effect of the Meech Lake accord will be to make the government of Canada "powerless to take such initiatives" as medicare, financing of post-secondary education and even the Trans-Canada Highway. OPSEU has the gravest concern about the restriction of the federal spending power that is entailed by allowing provincial governments to opt out of any "national shared-cost program" in an area of exclusive provincial jurisdiction and to receive "reasonable compensation" provided that they launch "a program or initiative that is compatible with the national objectives."

The union movement has fought hard for national social programs like medicare. A national child care system is long overdue, as is a comprehensive accident and disability compensation scheme. The accord's restrictions on the federal spending power threaten to stop such new measures altogether, and many observers have suggested that they also threaten the continuation of existing programs if their future modification may be held to bring them under section 106A, hence allowing provinces to opt out and demand compensation.

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In OPSEU we have had some recent experience with opting out. We have been fighting the National Citizens' Coalition, which has financed court action by a nonunion college teacher, who is trying to escape paying the equivalent of union dues for many of the benefits he enjoys by virtue of union representation. Merv Lavigne and his financial backers have tried to use the Charter of Rights to enable dissident employees to opt out of their share of the cost of the many initiatives that their legal bargaining agent democratically decides to undertake in their interests, thus undermining the ability of the labour movement to play its traditional role in helping to define the economic, social and political directions this country will take.

Similarly, entrenching a provincial right to opt out from the Constitution will undermine the framework of national programs that does so much to define us as Canadians. The right to compensation may render new or revised programs impossibly expensive for the government



of Canada. Already, Ottawa has cut back sharply on its commitments to shared-cost initiatives under the Established Programs Financing Act.

Why in future would any federal government want to push for additional spending measures, when the services intended to benefit Canadians could, in province after province, be designed and put in place as initiatives of the provincial government, for which it would get the entire political credit while Ottawa was relegated to carrying the brunt of the financial can?

The loosely worded requirements respecting provincial alternatives—just one part of what Professor Schwartz calls “the boggling ambiguity” of section 106A—threaten a checkerboard Canada characterized by a diverse and incoherent array of government services. The wording of the accord in this area is bound to give rise to federal-provincial disputes over the meaning and legitimacy of “national objectives,” whether a provincial “program or initiative” is “compatible” with its federal counterpart and over the justification for and scale of “reasonable compensation.” It is clear that crucial issues respecting government programs will as a result be determined by the courts, rather than by our elected representatives.

OPSEU condemns, in particular, the accord’s failure to guarantee the public character of the fundamental programs for which Canadians pay through their taxes. We are fully familiar with the disposition of provincial governments to contract out and privatize services to people. We fear that the national child care system will have an unacceptable level of for-profit provision as section 106A is now phrased, even if the current federal government and its pandering to the private sector are alike removed by the outcome of the next general election.

OPSEU has hundreds of members who work in private child care centres; they know the price paid, in poor wages and deficient programs, by the teachers and children who work in the for-profit sector. OPSEU also supports the National Anti-Poverty Organization in its insistence that the poor Canadians whose meagre levels of support are sustained by the cost sharing of the Canada assistance plan should not be put at risk by any undermining of that program.

OPSEU therefore calls for the accord to be amended so as to establish reasonable federal limits on provincial expenditures of shared-cost funds. The criteria set out in the Canada Health Act should secure the Canadian public interest, provided the Parliament of Canada is explicitly empowered to set national standards for the

shared-cost programs offered by provincial governments.

I would now like to call on brother Larry Brown from the national union to proceed.

**Mr. Brown:** Our organization is very concerned at the influence that this charter and this accord grant to the provinces with respect to important national institutions, such as the Supreme Court of Canada and the Senate.

I think it is unarguable at this point in our history that the Supreme Court has crucial responsibilities in the interpretation of the Constitution, and the presentation we have been making to you indicates that those responsibilities are going to grow and not shrink, as the ambiguities in this accord will put more and more of a crucial role on the Supreme Court for determining the future direction of this country.

That court requires judges who are of the highest calibre both in terms of their competence and in terms of their distance from the partisan political process. They must take a truly national view of the issues that they have to decide on. I think the accord very seriously puts in jeopardy that kind of national calibre of a Supreme Court. Members of this committee will understand the union’s objection when employers of any stripe contract out their work. To some very disturbing degree, the federal government has contracted out the appointment of Supreme Court judges under the accord. The parallel may not be exact, but there is a disturbing allocation of responsibility to the provincial level.

It may be that some provinces can help to rectify some of the damage done by that by making sure that the appointment at a provincial level is done with some public scrutiny and with some public input, as the Attorney General has suggested. But that hardly remedies the situation in nine other provinces. The experience in those provinces and the experience of the process of appointing judges by and large indicates that there is already far too much patronage involved in the appointment of judges. We are in danger of seeing now far too much agency involved, where provinces will appoint to the Supreme Court only those people who are prepared to take forward the province’s position.

One very disturbing current example of that has to do with the most recent very public decision of the Supreme Court on the question of Canada’s abortion law. The Supreme Court struck down the abortion law; it said in a very compelling decision that the abortion law in Canada was not valid. We have a Premier in British Columbia who is deciding unilaterally

that he is going to determine what the law with respect to abortion should be and that he is prepared to override the Supreme Court of Canada.

That is a problem for the people of BC to deal with but, in the meantime, we are looking at a situation where the Supreme Court, making determinations on such fundamental matters, is now going to be put in the hands of people like Mr. Vander Zalm, who has clearly indicated already that he is prepared to flout the law of the land in order to get his personal opinions upheld.

I do not think it is a flight of fancy to suggest that under the new Meech Lake accord provisions people like Mr. Vander Zalm are entirely capable of ensuring that the Supreme Court is loaded with people who share their particular religious or moral persuasions so that they can be assured that decisions like that do not happen again in the future. That is not something that should be tolerable to the people of Canada.

We do not ascribe comparable significance to the Senate, quite clearly, but we do deplore the federal concession to the provinces allowing the provinces to nominate senators. One of the reasons that we deplore that, quite frankly, is that it seems to us it is almost certainly going to prevent real Senate reform in the future, because you now have 10 premiers who have been given access to a place where they can nominate people who have served their political parties well, which is basically what the Senate serves as.

That right has been spread out to 10 people, all of whom must now agree unanimously to amend the system. That is asking a tremendous amount of human nature. To ask that 11 first ministers are going to gather in a room and all of them equally give up their right to appoint senators, some of them toying with that power for the first time, is asking an incredible amount of human nature, and I do not think it is practical.

What we are now going to see under the combination of the provinces' right to appoint senators and the provinces' right to veto any change is the Senate in perpetuity. Any chance of meaningful reform of the Senate has basically gone by the board with the Meech Lake accord.

We are dismayed and disquieted by the role assumed by first ministers' conferences. We are not dismayed by first ministers' conferences per se but we are dismayed when they are incorporated into the Constitution of Canada and given a formal role to play in governing our country, because 11 heads of government meeting together in a forum that is not accountable to determine where our economy is going is basically unde-

mocratic. The results of those decisions are not then held up to anybody's scrutiny.

It is very easy for any individual member of a committee not to have any part in a decision made by a committee. The Prime Minister can go back and, if the decision is unpopular, can blame it on the premiers and any individual Premier can blame it on everybody else because it is a collective decision-making process not accountable to anybody. There is no direct accountability process.

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Your role in the process, as being able to question your first minister, will be in effect nullified, because you will be unable to question him about a decision that 10 other people made. It is an unaccountable system that has now been put into place with no parliament, no legislature to answer to with respect to governing a matter like our economy.

On immigration, we are concerned that the end result of the Meech Lake accord could very well be 10 different immigration patterns in our country; 10 different provinces negotiating the right to control immigration into their own provinces. At some point, one has to question what role will be left for the federal government if immigration is in fact to be negotiated with every individual province.

Surely one element of national being is the question of how your country will grow, who will be allowed to immigrate and so on. That power, under the Meech Lake accord, is given to Quebec, guaranteed in perpetuity to Quebec, and offered to any other province that wants to take the federal government up on its offer. Even if only some of the provinces do, instead of one system of immigration to Canada, we will have several. That is surely a very dangerous matter for our national entity.

It is clear that the process of arriving at the Meech Lake accord was one of power brokers sitting at the table and trading their power back and forth, because the territories have been frozen out. They were not there, they were not represented. Their power brokers were not there to trade the bargaining chips and as a result they have been frozen out of the process, both of amending the Constitution and of nominating people to the Supreme Court and to the Senate.

The provinces have a veto over whether or not new provinces can be created in the territories, so not only have they been frozen out, but somebody else has been given an exclusive right to determine whether they will ever enter the club. It is outrageous that provinces would enjoy



that kind of veto over the admission of new provinces into the Canadian Confederation.

It is interesting that the joint committee of the Commons and the Senate at the national level agreed that was an unfortunate result of the Meech Lake accord, but instead of recommending that it be fixed, said that at some point in the future that obvious error should be corrected. That is a very strange way to approach a problem, to say, "Yes, there is a serious mistake made here; therefore, we think you should go ahead and implement it and fix it at some point in the future." Quite frankly, that is not the way we operate and we do not know why anybody else would.

Finally, the process of dealing with aboriginal rights under the Constitution is very unsatisfactory, because the first ministers' agendas are set in the Constitution—a very difficult document to change—and the agenda for those first ministers' conferences to deal with ongoing items of constitutional reform includes such matters as the Senate—which we have already determined will be basically wasted discussions, because unanimity will be virtually impossible to come by—and fisheries.

No disrespect to fisheries as an important item for national debate, but surely it is no less important to discuss the future role of the aboriginal people of Canada at those first ministers' conferences. Fish have been guaranteed their rights; aboriginal people have not.

**Mr. Clancy:** The Ontario Public Service Employees Union, NUPGE component, deplores the process by which the Meech Lake accord was developed. It calls for the strengthening of the Charter of Rights and Freedoms; condemns the accord's obscurity and uncertainty; opposes its adverse impact on equality rights; rejects its undermining of the federal spending power; regrets its negative impact on national institutions; and objects to the accord's modification of the constitutional amending formula, as well as to its treatment of the territories and the rights of native people.

Accordingly, we urge the select committee to reject the motion to ratify the Meech Lake accord. Instead, we call upon you to propose its renegotiation to rectify the serious deficiencies which have been outlined in this brief. Mr. Mulroney has said there is no room for amendments and Mr. Peterson has taken a similar stance. We believe it is your responsibility as legislators to reject the view that we cannot do better than the Meech Lake accord by returning a

negative recommendation on its package of retrograde constitutional changes.

Mr. Chairman, I have one final question for you. Having appeared before you and made our presentation, what assurances can you provide us that what we have had to offer in this constitutional debate will have any opportunity for real and meaningful input for change into the process in regard to this Meech Lake accord? Having spent the time with members of my union, the national union, I have a real interest in knowing from you whether we really have an opportunity to make change here through this committee of which you are the chairman.

All of this is respectfully submitted and we thank you for the opportunity of appearing before you today.

**Mr. Chairman:** I suppose in a sense the only answer, ultimately, would be in the nature of our report and what happens to that report. I do think we are all elected members of three different parties who I hope have some sense of integrity and view this as a tremendously important task we have been asked to do. I think we have all said at different times during these hearings that none of us would ever want to go through this again in the context within which we have been given this job at the present time.

That being said, that is there. We all know what different people did back in April and June, but, as a committee, our responsibility is to the Legislature and we are going to listen to you and to everyone else who has come before us and try to put forward what I hope will be as honest and frank a report as we can.

I think one of the things we have discovered to this point that has been tremendously important—and I say this with no disrespect meant to our colleagues in Ottawa—is that in terms of the number of presentations that have been made and will be made to us, such as today, and in terms of the number of written presentations made to us, we will be providing a forum in which there will be a great deal more public education and discussion of these issues, which certainly was not there in the process leading up to the accord. I think that is awfully important.

We are part of that process. As you are aware, Manitoba and New Brunswick have said that they, too, are going to be having committees. The Senate of Canada is currently looking at the issue as well.

I am a great believer in ideas and time. I think we have room for both. Where that is all going to lead us, I do not know, and I am not trying to mislead you and say that you have come to the

right place and tomorrow we will have all the answers. But I am most appreciative, and I know the committee is too, that you did take the time to develop the ideas you developed and to bring them before us. We will try to deal with them as honestly as we can.

**Mr. Clancy:** If I can make one quick comment following your remarks, I appreciate your thanks in regard to our presentation, but to be very frank with you, in making a decision whether to appear before this committee or not, I spoke to a number of my constituents, union members, and what they were relaying to me was there was a real sense of frustration or hopelessness because they felt that the committee, being dominated by the government members, the government members themselves would be ordered to follow a caucus line and the Premier has already established that, if you will, by saying that it cannot be altered.

I persevered and was able to persuade them that it was still important for us to appear before the committee, but I wanted to relay to you the frustration that some of my members feel, citizens of this province and constituents of this government. In approaching this task, they felt it was really a foregone conclusion that the government, by dominating the committee, would insist that the party line would have to be followed.

That was really the reason I posed that question.

**Mr. Chairman:** I appreciate that and I think that is certainly fair comment. The only thing I would say, in terms of my colleagues from the government side, is that what we have insisted upon doing in this committee is listening openly and frankly, and whatever somebody else who is not a member of this committee has said is interesting but that is not what we are doing here.

Clearly, after this is all over and we sit down and try to determine what it is we are going to do, we will have I am sure some fascinating and interesting discussions, but I am glad you persevered and brought these views to us. I can assure you we will deal with them; and if we do not we have colleagues from the other two parties who will certainly bring that to our—

**Mr. Clancy:** So I take it those members of my union who spoke to me in those terms are incorrect in their assumption that the Liberal members of this committee have been ordered to—

**Mr. Chairman:** We have not been ordered to do anything.

**Mr. Clancy:** I appreciate your frankness.

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**Mr. Breagh:** I think a couple of things need to get put on the record.

You have mentioned repeatedly in your presentation today—and I wish you had been at Meech Lake; we might be able to understand this other accord a little better if you had participated in the writing—you did talk about the process a lot. If nothing else comes from our deliberations, somewhere we must put an end to the process we just saw. If that process were allowed to stand, if the concept were embedded that it is acceptable to the people of Canada that 11 men, no matter what their elected position, are legally empowered to go away to the cottage for the weekend with a case of Blue under each arm and rewrite the Constitution of the country and no one else is allowed to say anything about it, we are in deep and dire trouble. There are those of us who contend that we are in deep and dire trouble anyway, but I do think that point really has to be made.

Let me pursue a couple of other areas that we seem to be sidetracked on. There are a number of groups coming before us—and you have made reference to this too, so I think we have to deal with it—kind of urging the committee to move an amendment. I have been attracted by several amendments that have been proposed, particularly ones put forward yesterday by Tony Penikett from the Yukon.

The problem with that is, if there ever was a morass in Canadian political history, imagine what will happen when 12 legislatures all start wending their way towards amendments to this process. Each of the 2,000 or 3,000 people who are involved will have to agree with each and every word of each and every amendment that is put. Given the parliamentary skills located in those chambers, the number of occasions when they could not put the question, talk it out for the afternoon, word it in a different way, insert a comma—it could be well into the third century after this one before anything was done.

There are several areas where people need clarification, where we need to refer matters to get a Supreme Court opinion. We have seen proposals where people said, “We do not like the way this is worded, but if we had a better understanding of what was really meant here or how it would be implemented, perhaps it would be acceptable.” I am just wondering whether you would give us your opinion on whether that would be a useful avenue for us to at least explore.



There may be ways where we can clarify it. Again, a number of groups before us have really said: "We do not know what this means. If somebody could clarify it for us, that will make the critical difference whether we think this is a good idea or a bad one." There are some ways that have been suggested where this committee could in fact do just that. Is it worth while pursuing it?

**Mr. Clancy:** Before I call on my colleague from the national union: the first point is we spoke to the ambiguities and I could not agree with you more. There has to be a way of determining what those mean now. It makes sense from a very practical viewpoint.

In addition to that, we are saying that we urge this committee to reject the motion, because aside from the ambiguities we see some other real deficiencies in it. It seems to me if there is the will—this is a very serious issue, an important issue to the country—then this government and other governments across this country, and indeed the federal government, can come together, perhaps taking into account what each of these committees has heard across the country, committees in those provinces that set them up similar to what we are doing here in Ontario. Let us pull people together in fairly short order.

There are a number of inadequacies that people are pointing out, regardless of whether you are in British Columbia, Prince Edward Island or Newfoundland. There are clearly some real failings in this accord.

**Mr. Brown:** I wonder if I could just add a word.

First of all, granted there may be some difficulty with the amending process, but the worst amending process that we could come up with would at least be an open process and therefore better than what we have had so far. I am a little bit frustrated, quite frankly, with somebody saying: "We have boxed you into a corner here. The accord, granted, may be bad, but we cannot think of a way to fix it so therefore we have to stay with what we have." That frustrates me. I do not like those kinds of solutions.

With respect to the ambiguities, that is an interesting point you raised but I have two concerns about what you say on that. The first is, who are you going to ask? The accord in many places is not ambiguous according to the drafters. They all have a very clear idea of what it was they meant to say. The difficulty for those of us who were not in the room is that they disagree with each other.

The province of Quebec, for example, is very clear on what its power now is with respect to federal cost-shared programs. It is not the same understanding the federal government has. I have seen markedly divergent views on what the immigration powers are between different governments that participated in the process. Who are you going to ask?

The language is not unclear by accident. The language is unclear by design. It is a very fragile accord that we have here. Those parties can only continue to agree with each other in so far as they continue to misunderstand what the other party meant. The ambiguity is clearly, I think, by the admission of the Prime Minister at one point, a design feature.

While we can appreciate that, it is, quite frankly, a nonsensical way to negotiate a constitution. If there is not any better agreement than that, then we do not have one.

**Mr. Breagh:** If I could just conclude with one quick one: at the heart of what we have to decide are—a lot of what has been discussed so far even in these committee hearings—intentions. We have no way of knowing intentions because we are not privy to the discussions. I guess it is a judgement call.

If our judgement call is that this process is so foul that it would be folly to pursue it any further, we should just say: "No. To hell with the whole process. We want nothing to do with it." That is one way to deal with it. If we are not clear at the end of our hearings—you know, there may have been good intentions; there is an opportunity for us to clarify a situation and to rectify it; somebody who raised legitimate concerns now no longer has to face those concerns and we make the valid judgement call that as a package, this is good or bad, there is something you can salvage. I think it is difficult for us to do that.

Part of our problem is that if there were 10 committees and committees in two of our territories functioning as we are, and we were looking at two years from now to put all of these words on the table, to gather up the consensus, then it would not bother me if the 11 wisest people in the country went to Meech Lake for a weekend. It would not bother me at all, because they would be going there with all of this material in their briefing books, all the recommendations from legislative committees. The problem I have is that this one is going the other way around, and we are precisely backwards to the way we should be functioning.

**Mr. Clancy:** But if it takes two years, so be it. It is worth it.

**Mr. Breagh:** Yes.

**Mr. Clancy:** I argue that if there is the political will, if this federal government along with the provincial governments said, "OK. It is March 1988 and we want this process finished by December 1988," do you think they could not do it? They can do all sorts of things when they put their minds to it. So you would go back out, hold hearings like this with due public notice, follow a very public process, invite people out and then collect the submissions and pull that together. It can be done.

**Mr. Breagh:** OK; thank you.

**Mr. Offer:** Your last comment was actually the answer to the question that I was going to ask. He must have known I was going to come up with this question.

**Mr. Chairman:** We are doing everything backwards here.

**Mr. Offer:** That is right.

In your concluding remarks, you have indicated you are concerned with the process, and I know that is putting it lightly from your position. Your next point was calling for the strengthening of the Charter of Rights and Freedoms. The question I ask is, that second recommendation, of necessity, calls into play a response to your first concern with respect to process. In other words, if you are calling for the strengthening of the Charter of Rights and Freedoms, how are you doing so in terms of process? I was wondering whether you might share with us how, maybe not with respect to the Charter of Rights and Freedoms being achieved, but how indeed the process with respect to constitutional reform can be improved from your position.

**Mr. Clancy:** Starting with forums like this, public debate. I do not want to belabour the point or repeat it, but they went away, cooked the deal and came out and said: "Here it is, and by the way you cannot change it." This is the Constitution, the supreme document that is governing the lives of not only the Canadians of today but also the Canadians of the future; and they go away and cook the deal.

The first thing is public debate. You listen to what people are saying. It is their document. If you expect people to follow it, to uphold it, to embrace it and, indeed, to cherish it, you had better give them some input into the development of it. The process is skewed and it has to be rectified. That is the job of this committee, to do what is in its power to ensure that happens so that the weaknesses are corrected. I could go all through what the weaknesses are, in our estima-

tion, and I am sure that others will come before you and point out other deficiencies.

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**Mr. Offer:** We have heard, of course, some concerns with respect to the process, and that is what we are going to address ourselves to.

**Mr. Clancy:** It is pretty simple. Either you as a government here in Ontario accept some of the criticisms that are pointed out—and there are serious deficiencies in it—either you have the courage to take it on, challenge the process and ensure that it amended, or you do not. It is really that simple.

**Mr. Offer:** But in dealing with the process—what we have to do, what we should do and ought to do—I think we on this committee are going to try to address our minds to that issue by asking you and delegations such as yours that have come forward and taken the time and the effort to discuss that process to go that one step further and say, "Listen, yes, we have concerns with the process"; and share with us from your perspective how that process with respect to constitutional change can be improved.

I thank you for taking that time and effort today. I think the points that you made with respect to the whole public process and the public hearings are things that we are going to have to, ought to and in many ways look forward to deliberating. I think a lot of people are waiting to hear that.

**Mr. Brown:** I suspect that if people found they had a government and then had a vote afterwards, they would be a little bit perplexed by the process. In effect, that is what we have got. We found out that we got a new government and now we are getting the vote, but we have already been told that it is irrelevant because the government is already in power. It is a fundamentally undemocratic process and it cannot work. If everything appeared to be fine it still could not work. You could not allow it to happen.

**Mr. Clancy:** It is like building the bridge, the causeway from Prince Edward Island to the mainland: you build it and then go and ask the people if they want it.

**Mr. Brown:** Guess what? People are frustrated; there is a sense of hopelessness and they say, "What is the point of voting?"

**Mr. Chairman:** I have Mr. Sterling and Mr. Allen, and I am mindful of the clock.

**Mr. Sterling:** I would like to thank you for your well-thought-out brief on this particular matter. I think your question at the end is really a



very important one in criticizing a process which took place, and my colleagues and I, particularly in the opposition, are having to participate in a process which may exacerbate a bad situation. The submissions to this committee that I have heard so far have been really quite excellent, well thought out and well put forward.

I can only say, in terms of my experience over the last three or four months since this government was elected, that we have referred to a committee the free trade issue, when they had already decided in the Legislature, regardless of which side of the issue you were on the position of the Legislature. Then they asked a committee to hear people talk about it.

Two or three weeks ago, I sat on a committee dealing with conflict of interest in terms of how this Legislature should run. The Attorney General came in and said, "We want to listen to you," but accepted no major recommendations at all for that particular bill. Both opposition parties have had to vote against a piece of legislation which really runs this place, and I think it is a very weak way to have a conflict-of-interest bill go ahead.

Then there is this particular matter, which was only put in front of the committee at the urging of the opposition parties. In fact, there were not going to be any hearings originally. Mind you, we may not have urged that if we had known the conditions we were going to get it under. I have some real concern about what this committee is doing from day to day in terms of calling people in front of it under, perhaps, the charade that something is going to happen.

**Mr. Clancy:** Mr. Sterling, I am sure you have got lots of important work to do rather than sit here, just as we do. We have contracts, we have laid-off workers to defend and so forth. Ironically, we sit here and criticize the first ministers for secreting themselves away and making deals. If they called my union and said, "Will you get on a plane and come down here and talk to us about the charter?" and if on the same call they said to me, "But we want to tell you, you cannot change our mind, it is already made up"—guess what? I would not go.

By analogy, why would I come before this legislative committee if it is foregone? That is what concerned me. In our brief, we talked about Premier Peterson's statement that you cannot change it. That is why I was prefacing those remarks or my summation tabling those remarks with the chair. We have a deep and abiding interest in this issue and we want to see changes.

**Mr. Sterling:** The other part that I would like to ask a question about is in terms of carrying on

the free trade debate. There is a lot of opinion associated with the free trade agreement because people cannot predict what might happen with as great certainty as they can with this particular change in the way we are doing things in Canada. I think it is easier to look at the accord and say: "These are the negatives; here are the positives." There we are dealing with economics, we are dealing with projections and all those things. It is unusual to get two economists to say the same thing regardless of what position they might take.

In this one, in terms of what I have heard from people, from your group and from other groups, there are a tremendous number of negatives, and I am not hearing the positives. One positive is bringing in Quebec in a symbolic manner. Even the Premier of this province admits that Quebec is legally part of Canada anyway and has been since 1982. It is a symbolic measure. You are involved in negotiations all the time. Do you think that symbolic tradeoff is worth the negatives that everybody has seen in this particular package?

**Mr. Clancy:** Not at all, comparing today, 1988, with 1968 in terms of Quebec and the "quiet revolution," I think it has changed dramatically, this country's attitudes towards Quebec, francophones; and vice versa. The symbolism, while important, is not worth the baggage that it has brought along with it, the negatives that impact on the charter. I think we can still achieve the former, that is bringing in Quebec, but at the same time we can assure other Canadians who are disenfranchised by this process that their concerns are heard and taken care of.

Just as a quick word on that, we should be very careful not to make the mistake that Mr. Bourassa is Quebec any more than Mr. Peterson is all of Ontario. There are a lot of people, including people we represent in Quebec, who have no more time for the Meech Lake accord than we do. When we say, "We brought Quebec in," we should be careful to distinguish. We brought Mr. Bourassa's government in, and not necessarily with the greatest goodwill of all the people of Quebec. They see this as not being something in their interest either; for different reasons perhaps, but that does not change the fact.

**Mr. Allen:** Thank you for a very trenchant and toughly argued brief, which makes a number of very good points. I think it is quite helpful to us. I am not sure I agree with you, with all due respect, that it is possible to draft a constitution with the clarity of a collective agreement. The terms of

reference, the players involved and the issues are of such a scale that in order to achieve some *modus vivendi*, some basis of continuing to live together in a very large establishment like a nation, you are into tradeoffs that simply have to be settled over time. I really doubt that one can provide that degree of clarity at all points.

I need a little clarification from you, however, on the business of spending power and provincial opting out. I thought as you started working into that you were principally concerned about weakening federal spending power and the capacity to field social programs *per se*. Then as I read a little further, I saw you checking off both provincial and federal ends of the game in terms of their inadequacies in delivering what were acceptable social programs, from your point of view, through the shared-cost mechanism.

You tick off both sectors, both levels of government, for example, for being prepared now to follow the privatization route under the day care stuff. I was not quite sure whether it was both messages, or whether you were principally concerned about some content that needs to be put into the phrasing of objectives or whether it was principally the weakening of federal spending power and the fracturing of federal programming.

**Mr. Clancy:** Mr. Allen, both contentions are valid, the one being that the federal government does not have the same incentives to transfer funds. Perhaps it does not want those incentives when they are not clearly identified with the resultant disbursement of those funds to the people within the province. Likewise, provinces will have the opportunity to opt out of commitments that heretofore have been fairly uniform across the country. That is the concern we have. The concern is exacerbated by the attitude of some provincial governments towards the funding of social programs and health care programs; indeed even educational programs.

We felt that the criteria set out in the Canada Health Act were the criteria we should be upholding, thereby locking both the federal government and the provincial governments into uniform programs across the country. We are very concerned about the development of privatization, contracting out, particularly of social services, the for-profit motivation in health services and social services in particular, the manifestation of that in places like British Columbia and Saskatchewan and the consequences of that.

We are also concerned that, as part and parcel of this manifestation of so-called Thatcherism, Reaganism, Mulroneyism, neoconservatism, whatever it is called, the free trade agreement will also tend to lock us into positions which will make it far easier for the federal government than the provincial governments not to be involved in those social programs. We think that would be a sad day for Canada.

**Mr. Allen:** I certainly like the latter emphasis. For want of the kinds of terms relating to defining the national objectives of shared-cost programs, the issue of whether a province has a right to opt out or whether it can devise its own program as distinct from a federal program is not necessarily a bad thing, if you imagine a federal government that was putting very low-level demands on the provinces and provinces wanted to opt out and construct more progressive and adequate social programs, knowing that some of the social programs we have, such as medicare, did begin at provincial bases.

There are provinces around that are more progressive than some of the federal governments I can think of, including this one. But I rather like your way of solving that problem by setting some basic criteria that define the overall parameters and objectives of the national standards, to keep both levels of government on a progressive track in the delivery of social programs.

**Mr. Usher:** With respect, Mr. Allen, the emphasis is rather on the withdrawal from those services and the opportunity to withdraw from them rather than to add to them. I do not think there is anything in the accord that would be detrimental in that effect, that the province could provide whatever services it felt reasonable, given the political will, of course.

**Mr. Allen:** But to be able to use federal money to do so is another question. If you want to top up your own program and use the federal money to do so, that should be there. That is opting out, but of a progressive and positive kind.

**Mr. Chairman:** I want to thank you very much for taking the time, for persevering and for developing your brief. I hope when this whole exercise is over, you will feel that it was worth while and that it led to something. We very much appreciate the time you took and the various views and points you put forward. Again, thanks very much.

I will ask Chief Gordon Peters and the representatives of the Chiefs of Ontario to come forward.



I also want to say to the representatives of the Congress of Black Women of Canada, do not despair, we are going to get there. I am sorry that we are running a bit behind, but we will certainly be here to hear everyone who came this afternoon.

Chief Peters, we are delighted that you could join us today. I wonder if I might ask you to introduce your colleagues and then proceed as you wish. Upon the completion of your remarks, I know we will have some questions to put to you and your colleagues.

#### CHIEFS OF ONTARIO

**Chief Peters:** Thank you, Mr. Chairman. On my left is Grand Chief Joe Miskokomon of the Anishinabek and on my right is Shin Imai, one of the legal counsel of the Chiefs of Ontario.

What we would like to do, first of all, is to read the prepared statement we have dealing with the concerns we have. It is important for us to point out clearly before we start that we have empathy with the New Democratic Party and the Conservative members of this committee when they talk about the frustrations they have in dealing with the fact that they are now concerned with an issue that has already almost been resolved. I think that you will now understand how we feel as Indian people and know the frustrations we feel. This is an everyday occurrence for us in dealing with issues that are already settled as a matter of fact before we deal with them.

**Mr. Chairman:** I hope that sense of empathy and sympathy extends to the Liberal members as well. We, too, are frustrated by this.

**Chief Peters:** I would like to say that but, unfortunately, I will wait until I see what recommendations come from the committee.

To begin with, I would like to thank you for the opportunity to make this presentation this afternoon and to bring forward the concerns that we have as first nations regarding the Meech Lake accord. There are over 130 first nations in Ontario and our people number over 100,000. It is very important that you understand that we are many people, not one group of people.

We have different languages, different cultures, different traditions and laws that are still very much intact. Since long before the settlers came to our country, these crucial elements of society have provided the basis from which our nations have handled their own affairs. Yet the federal and provincial governments have persisted in dealing with us as one social entity, as one ethnic group of people, without regard for us as distinct and separate nations.

Our nations have always had their own lands in this country—always. We did not come here from somewhere else; we have always been here. When the settlers came here, we made treaties with their governments, as nations to nations. We have honoured these treaties. We agreed to share portions of our lands so that you could live and survive here and we agreed to share our resources with you. But we have yet to see the benefits of the vast resource revenues that have been reaped from our lands. The governments of Canada have failed to honour our treaties. We must have a constitutional commitment guaranteeing that our treaty rights will be implemented in accordance with the spirit and intent of the treaties.

This is a large province. There are 450,000 square miles of land of which 87 per cent is provincial crown land and less than one per cent federal crown land. Within those federal crown lands, first nations occupy 0.6 per cent of the land of this province. We are talking about approximately 2,700 square miles of land on which we live, but not enough on which to survive and evolve.

This is a wealthy country and a wealthy province built on the resource development of our lands. Some people have said that we are a tax burden, but they do not take into account that we have contributed and continue to contribute to this country in terms of land, resources, manpower and taxes. They do not take into account that moneys appropriated by parliament for first nations are almost totally taken up by non-Indian bureaucracies, such as Indian Affairs with over 5,000 employees.

All we want is our fair share of land and resource development revenues in Canada. That would be a tremendous benefit to the Canadian public as we become even more productive and once again become truly self-sufficient and further contribute to the growth and development of this country.

#### 1540

We are looking to regain our political, social, cultural and economic self-sufficiency. This requires that there be a true and explicit recognition of our rights as first nations to govern ourselves, to be self-determining. These are identifiable characteristics of a people, and we have been struggling to achieve this recognition through five years of constitutional discussions.

Instead, the Meech Lake accord and the Langevin agreement, reached in days, gave recognition of undefined rights to another people but not to first nations. It would have been easy to

include aboriginal rights in the agreement without jeopardizing the accord had the political will been there.

The drafters of the Meech Lake accord did a good job in appeasing Quebec and the other nine provinces, but they failed to deal with the original people of this land when dividing up the powers of this great nation. Because of this injustice, first nations have five major concerns with the agreement they struck.

1. A weakened federal power. First nations have a direct link to the federal crown. There has been a shift from the federal government to the provinces, and this concerns us.

In natural resources, for example, we have not been well served when we have had to confront narrow provincial interests in resources. With the provision to have the Supreme Court of Canada filled with provincial nominees, we are concerned that our interests will take a back seat. Also, with the opting-out clause on national cost-shared programs, it is likely that it will be more difficult for first nations to have control over programs which may come under provincial control.

2. The unanimity requirement for new provinces. Some aboriginal people in the north aspire to provincial status. Their road to greater independence is made more difficult by the requirement that every single province must consent to the creation of a new province. The people of the north and all aboriginal people must have the power to decide on their political status.

3. No aboriginal participation at future first ministers' conferences. We must have participation in first ministers' conferences on matters that directly affect us.

At the present time, we are attempting to get explicit constitutional recognition of our right to self-government. Until that is done, we must have an opportunity to protect ourselves from the decisions made by provincial and federal governments that are detrimental to our rights. Fisheries, for example, are vital to us, and it is totally unacceptable that the federal and provincial governments would discuss dividing up the jurisdiction over fisheries without including us in the discussions.

4. Recognition of first nations as distinct societies. We have no problem with the inclusion of Quebec in the Constitution, but to categorize Quebec as a distinct society and to leave out any mention of aboriginal peoples is to ignore the first societies of this land. We were shocked that the first ministers agreed to recognize Quebec as

a distinct society. It is a vague and undefined term.

In our meetings with the first ministers, they constantly told us that it was impossible to recognize the vague and undefined right of self-government. "Define, then sign," we were told over and over again by predisposed premiers. Obviously, different rules apply when they deal with one of their own.

5. Future first ministers' conferences on aboriginal constitutional matters. The first ministers' conference in March 1987 was the last formally scheduled first ministers' conference on aboriginal constitutional matters. No agreement was reached. No future meetings have been scheduled. The Meech Lake accord is silent on future aboriginal and treaty rights conferences.

We are again faced with the attitude that if aboriginal peoples are ignored, they will cease to exist. The fact is, first nations will never disappear, and you will have no choice but to deal with us. The federal joint committee recommended that a first ministers' conference be held before 1990, and we would like to have that constitutionally guaranteed.

The impact of attempted colonialism on our nations over the past four centuries has been significant and severe. The changes we are seeking to the accord and to the Constitution will begin the reversal of those impacts and support the growth and development of our self-determination and self-sufficiency.

There are those who feel that the recognition and implementation of our rights will have an impact on the non-Indian public, the non-first-nation communities. They are right. There will be an impact. But they should have no fear. They will not be dispossessed of their homes or their lands. Their lives will not be violently disrupted as ours were. They will not be restricted to small parcels of land. But they will have to respect our rights and our jurisdiction over our lands, our resources and our people.

The federal and provincial governments can expect a reasonable amount of backlash as this process of implementation proceeds, and they may have to pay for some mitigation measures. But this is nothing new or precedent-setting. Time and again, when companies shut down or mines close, it is the federal and provincial governments that pay the retraining and rehabilitation costs as part of their mitigation packages.

We cannot be told to trust and wait any longer to seriously address these concerns. If the federal and provincial governments continue to ignore our rights, the situation will only grow more



tense. As an example of what I mean, last September, people from Kettle Point on Lake Huron were prevented from fishing for food in their designated waters. They were confronted by armed enforcement officers and arrested. The fishermen were exercising their treaty rights, and yet this violent enforcement activity came very close to resulting in a fatality.

This experience shows why we need to have a clear constitutional resolution on our rights. There is a great deal of ambiguity about the extent to which our rights are recognized, and this ambiguity leads to some very ugly situations.

Also, last September in James Bay, for no apparent reason, the Royal Canadian Mounted Police stormed in and began laying charges and harassing our people engaged in their traditional goose hunt. The chiefs and leaders were so angry that they threatened to go out into the bay and confront the RCMP directly. Again, this type of brutal intrusion into a first nation community can only result in more mistrust and potential confrontation.

These are two recent examples within the past year in Ontario. We could also mention situations like Lubicon, low-level flying in Labrador and the Bear Island/Temagami case in Ontario.

These actions are consistent with recent magazine articles that say our cultures are irrelevant, that our way of life is archaic and repeat an argument that ancient societies should have been allowed to die. This is cultural genocide.

We believe in evolution and change. Throughout history, our nations have continually evolved and adapted, but always in accordance with our values and principles. That has been the key to our survival.

We have evolved and will continue to evolve, and we expect that Canada, and Ontario as a part of this evolving country, would develop and promote a change in attitude towards us as the aboriginal people of this land.

In order to do this, they have to stop kidding themselves that there is an Indian problem to be solved.

In 1920, Duncan Campbell Scott, then deputy superintendent of Indian affairs, articulated the policy clearly when he said:

"I want to get rid of the Indian problem....Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there's no Indian question and no Indian department."

This was the thinking of 1920, but it has become clear to us that not much has changed in 1988.

In 1948, there was a paper that was written that proposed the "liquidation of the Indian problem in 25 years" in Canada. Before that time period had run out, then Prime Minister Pierre Trudeau released a 1969 white paper, which again tried to institute a policy of total assimilation.

Next came the debates on the patriation of the Constitution. There was no mention of first nations in the Constitution, but we fought our way into recognition in 1981. Then a secret deal was made and we were dropped from the Constitution.

With the support of the Canadian public, we fought our way back in again, and the federal and provincial governments were publicly required to recognize our treaty and aboriginal rights in the Canada act that was passed in 1982. Unfortunately, those governments did not follow through on the wishes of first nations and the Canadian people.

Through four first ministers' conferences, we have fought to have our rights clarified; but the federal and provincial governments could only see ways to limit and restrict the exercise of our Indian sovereignty.

The last formally scheduled first ministers' conference on aboriginal constitutional matters was in March 1987. It ended with no agreement. A month later, the Meech Lake accord was struck, and we were left out again.

The political leaders in this province have the opportunity to direct and be a part of the major evolution of their governments. They have shown their ability to recognize the good and the bad of their governments.

Premier Peterson recognized that free trade would be detrimental to Ontario and is actively seeking changes to the agreement. He also recognized that there were other constitutional issues that could be detrimental to the people of Ontario and built those concerns into the Meech Lake accord to protect his citizens. Now we seek the same kind of commitment and constitutional changes to protect our rights in the same manner.

Our survival depends on the recognition of our laws, which are different from yours, and the recognition that your laws may apply differently to us. There must be such recognition in the Constitution, which is your highest law of the land.

There is something that you, the committee, can do. You can recommend that the Ontario Legislature pass a resolution to amend the accord to meet our concerns. We hope that you have the courage and the vision to do that.

We also hope that the elected politicians of the province of Ontario who are now involved in nation-building will complete the circle of Confederation with the inclusion of the original people of this country.

It is possible to live in harmony. It is possible to live in peace. It is not out of the realm of possibility to recognize the sanctity and dignity of the first nations of Ontario. The government of Ontario can and must stop cultural genocide now.

1550

That ends the written statement of our concerns dealing with the recent Meech Lake accord and the Langevin agreement. In addition to what our concerns are, we have tried to show the kind of process that has taken place among first nations over the last 60 or 70 years, that we have been involved directly in the kind of processes that are being discussed at this table today and that we are not attempting to deal specifically with the written word of the agreement itself.

We want people to understand that any decisions made in sharing jurisdiction and power within this country that omit the first nations of this country are having a detrimental affect on us and are dealing with the process of cultural genocide.

**Mr. Chairman:** Thank you very much, Chief Peters, for the presentation, which has brought us into another area, for the first time, in some depth. I would like to open the questions with Mr. Eves.

**Mr. Eves:** Chief Peters, as you well know, for a brief period of time—some six, seven or eight months—I was involved with your process with respect to self-government. Believe me, I appreciate—perhaps not nearly as greatly as you—the frustration that you and your people must feel, having had to cope with the problem, not for a matter of six or seven months but for six or seven decades at the least.

I too find it somewhat inconsistent that 11 first ministers in this country can sit down and agree upon such a vague or ambiguous term as "distinct society" in a matter of less than 40 hours of negotiation and yet, as you say, when you ask for similar treatment, everything must be spelled out and all the i's dotted and t's crossed, so to speak, before they are willing to take such steps.

Perhaps you could be of some assistance to the committee in indicating to the committee more specific examples, if you can, of the type of resolution you feel our committee could recommend to the Ontario Legislature which could

either amend the accord or take the steps you would like to see with respect to recognition and your rights.

**Chief Peters:** First of all, one of our major concerns that we deal with in the process is the political will that is being demonstrated, or I should say not being demonstrated, by the federal government in this process and its inability to take the lead in dealing with aboriginal and treaty constitutional matters.

Second, within the process of the Ontario government as well, we have not found that political will to be evident in going the extra distance to be an innovator and a changer of the status quo in dealing with the question of our aboriginal treaty rights.

Some of the recommendations we had put forward before to the joint committee nationally, and which we would still put to this committee, are as follows. We wanted to continue working towards the resolution of constitutional aboriginal issues. We wanted to restore the constitutional funding to aboriginal organizations so that there could be ongoing research and participation directly with the ministers and the officials. We wanted to establish a timetable and a work plan for the federal government to prepare for future first ministers' conferences. We wanted closed sessions as well as open sessions on the constitutional discussions, and we wanted to establish 1990 as a deadline for the resumption of dealing with our aboriginal constitutional matters.

Further to that, what for us was very difficult in dealing with the agreement itself, and which we would like to see dealt with in some manner, is the definition of "distinct society," which was very vague and which was put into the agreement. There was a similar proposal that was put forward to the joint committee by the national Liberal Party that would have us fall under the same category. They offered to put forward an amendment that dealt specifically with the first nations being recognized as distinct societies.

Unfortunately for us, the problem with the "distinct society" process is that there are provisions, conditions and criteria that are attached to the kind of amendment that is being put forward. The bottom line is that it does not recognize the fact that we have aboriginal treaty rights in this country, and it maintains the status quo of the division of powers of jurisdiction within Canada and the provinces.

In terms of the accord itself, without getting to the heart of the accord, I do not know what could be done specifically to include provisions dealing



with aboriginal treaty rights that would make a significant impact on the kind of legal process in Canada and what is needed to clarify across this country once and for all the legal rights that we have as first nations in this country.

Certainly it could have amendments that deal specifically with some of the recommendations that we outlined and deal with the process that would, I guess in a manner of speaking, put us in a trust situation again where we would have to trust people to go back into a format where we would attempt to resolve problems again with aboriginal treaty rights.

I guess the bottom line is this: I know the Prime Minister has said he is not prepared to open up the agreement. I know the Premier of this province has said it would take a vast miracle of some sort in order for this process to be opened up again. So the only thing that is currently available to us is to add an amendment that would deal with the process for us to re-establish the constitutional mechanism to try to get involved in the constitutional process of implementation.

What I would like to make very clear to the committee is something that is not well understood a lot of times in dealing with us as aboriginal people in the country. We are not looking in the process to have the federal and provincial governments come to the table to identify and define what aboriginal and treaty rights are. We are already identified in the Constitution under section 35.

What we are looking for are mechanisms to implement aboriginal treaty rights. We are looking for ways to be able to repeal specific pieces of legislation, to make constitutional amendments and other changes that will help first nations have the ability to develop themselves without having barriers that prevent them from being able to exercise their rights and being able to continue to develop at the rate they want to develop.

I guess that is a long way of answering the question, but we definitely are looking for amendments. We would also be requesting that, unlike what has occurred at the national level, unless there are some specific amendments dealing with substantive Indian/first nation/aboriginal concerns as an amendment, your ratification of and agreement to this accord be withheld.

We asked the national parties to do the same thing, and we were unable to get that commitment. We were told that we should deal exclusively with some of our own people within our own provinces. We have come back, and that

is the reason we have chosen to come back to this committee, knowing that there was very little chance of dealing with the heart of the amendment itself.

**Mr. Allen:** Thank you, Chief Peters, and your colleagues, for coming to us with this brief. We are obviously wrestling with something that has been pretty close to the conscience of many of us and, I think, places a heavy burden on the political processes of this country. You have told us all of that again in a very poignant fashion.

Can I ask you first of all, when you discovered that Meech Lake had in fact left out any further reference to negotiations with the aboriginal peoples around self-government and other outstanding issues, and indeed left you off the table altogether, were you yourselves in contact with the government of Ontario and the Premier to carry your case forward, and what response did you get? Then perhaps you might respond to us in terms of how you evaluated the imposition of the introduction of section 16 at the Langevin round of the discussions.

**Chief Peters:** When we first became apprised of the situation within the agreement that there was no specific proposal dealing with aboriginal and treaty rights, our first reaction was to deal with the federal government. As you know, we are supposed to have a trust responsibility with the federal government. They are supposed to ensure that in any agreements that happen within this country of Canada our safety and protection are to be safeguarded.

**1600**

We directly contacted the Prime Minister of the country in dealing with the situation and the premiers and attorneys general across the country were informed by letter of our specific concerns with the Meech Lake accord.

It was Ontario that proposed the nonderogation clause in section 16 in the agreement. But when you deal with the basic premises that are there on the table currently within the constitutional format, and I mean in the bigger sense of dealing with section 35, when we get a nonderogation clause in the process, when the basic premise is that there are no rights there and rights are to be created in the negotiation process, then a nonderogation clause does not do you much good.

So the nonderogation clause, which applied only to section 2 of the agreement, dealt only with the question of when Quebec, as a distinct identity, came into conflict with aboriginal treaty rights in Quebec. It did not safeguard the aboriginal people from any other parts of the

accord that were negotiated. To us, a nonderogation clause under those pretences did not do a great deal for us, because there was actually nothing much about aboriginal people in the text itself.

**Mr. Allen:** So nothing times nothing is nothing. That is a simple way of putting it. I want to ask you a fairly practical question. I totally sympathize, and I think all of us must, with your sense of betrayal that it was possible so quickly, when it came to sitting down and talking about it, to apparently concoct a deal that would bring Quebec back to the table of Canadian Confederation, while at the same time it had been so difficult over four years to do the same thing for the first peoples of this country.

Some people have wondered out loud, in terms of the future practice of where we go from here, whether you are better served having Quebec at the table or not. What is your judgement on that? You have asked us to withhold assent to the accord if we cannot get what I think is a very sensible and critical amendment to the section on the first ministers' conference so that you are on the agenda in the first rounds of discussions to take place.

If we cannot get that nationally, if that does not happen, is it better from your point of view that Quebec be at the table? Will that facilitate your cause nationally?

**Chief Peters:** To begin with, I think that is one of the major misconceptions we have been dealing with in the last five years in the constitutional process. It has always come to the table as the situation that, had Quebec been involved in the constitutional process, instead of having to convince seven out of nine, you had the opportunity to convince seven out of 10. The second part was that you were dealing with a much greater population base, with Ontario and Quebec, had Quebec been in the process.

I find it very difficult to accept the proposition that had Quebec been at the table things would have been very much different. In our experiences in dealing with the basic premise at the table, when we were talking about the kinds of powers and the kind of authority and levels of jurisdictions that first nations were trying to achieve at the constitutional table, I do not think it mattered very much what governments were present at the table. I do not firmly believe that had Quebec been there throughout the duration, there would have been a significant difference in the end result of 1987.

**Miss Roberts:** The fact that "distinct society" has been put in there, you do not want to be

included in that "distinct society" clause? In fact, I think you already had rights enshrined in 1867 and before in many, many treaties, which are basically the way you wish us to deal with you. Am I correct in assuming that?

**Chief Peters:** Yes.

**Miss Roberts:** I do not have the background that you gentlemen have for working on this one so many, many years. Your need today, which you are expressing to us in maybe the most basic terms, is that you keep on being considered in the process and that you have a recognition in some manner, either through the Meech Lake accord or through other constitutional amendments that may take place or other meetings of first ministers or any other type of meetings, of enforcing what already exists for you.

**Chief Peters:** I think that is one of our primary concerns. I think you have stated very clearly that the rights of the aboriginal people are inherent to the aboriginal people. They cannot be created within the Constitution, nor can they be identified and defined within the Constitution. The treaties very clearly laid out the process of our relationship with Canada. Such documents as the royal proclamation of 1763 did not create rights, but rather created a process of determining relationships with first nations and with the government of Canada.

We would like very clearly within this country to have some recognition of those kinds of treaties and those kinds of statutes that are now enshrined in the Constitution Act of 1982. If the Constitution Act of 1982 has any legal validity, then obviously the treaties that are enshrined in there, the royal proclamation that is enshrined in there, must also have some validity.

For us to be able to enter into a court of law with those documents and say that we have the legal right to enforce our treaties within this country, that should be there for us and should be operational without question in this country, but unfortunately it is not. We have to come back to processes like this again and repeat to people that we are not in the process simply to look for amendments that would say, "Let us alter the process so we can move in a different direction." First and foremost, we are looking for constitutional recognition of the entity that we are as people, as human beings, as distinct people of this country, not to be confused with "distinct society," as in the accord itself.

Those are the kinds of mechanisms that we look for. I do not think anybody from the aboriginal side, in the five years of the constitutional process, ever came out and said: "We want



self-government today, we want it immediately, and tomorrow we are going to change the entire focus of Canada. Tomorrow, everything is going to change in this country, your laws, your courts, your parliaments, your legislatures, everything is going to change because suddenly you are going to have all these Indian enclaves running around with specific jurisdictions that are totally different than the existing laws of the land."

We are looking for a process and for mechanisms to enact the rights that we have. We know it is going to be a long-term process, but we understand very clearly in the process that we ourselves have a tremendous amount of development to do within our communities to get to that stage. But in order to move, we have to have mechanisms, we have to have doors opened, we have to have political willingness out there to help us achieve those levels. That is what we are looking for in these kinds of processes.

When I outlined the kind of process we have had for the last 65 or 68 years, it would seem very fair for us to be able to come to this committee and say, "We think the committee has a very upstanding, moral obligation to the first-nation citizens of this country to put some kind of leverage in place to help us reverse the injustices that have occurred." We do not think that is unfair. We think it is very rational. We think it is a question that the Canadian public has wrestled with and dealt with. I think that is why we are in the Constitution today, under section 35.

**Mr. Breagh:** There are many of us who feel that the great shame of this nation is that it has never fulfilled its legal obligations to its aboriginal people. In a sense, the nation is kind of founded on a lie, on broken promises. It has never fulfilled those obligations.

There are many of us too who felt that, about this time last year, we were finally getting to the point where we might have some kind of an agreement. We felt we were that close. But in that final conference, it was decided, I guess, to generalize, that it was too complicated, not clear enough, not possible. We were saddened that it went away defeated. Yet a month later, all things were possible, "No problem about language here; we will just put it all down now and figure it out later."

You mentioned in your brief today that the federal joint committee recommended a first ministers' conference before 1990. I am torn between saying, "Really, why bother? What would be the use of another one of those? What has changed?" and the rather darker scenario that if it is not done now and this accord comes to full

agreement, it really appears to me that it may never be possible. I would really be interested in hearing which way you would urge us to cut on that.

**1610**

**Chief Peters:** That is one of the major problems we face right now. There is a tremendous awareness among the Canadian public right now that there are major problems dealing with the implementation of aboriginal treaty rights in this country. We do not want to lose that focus we have with the Canadian public right now.

I guess it is in the same vein as the question that was asked earlier about the inclusion of Quebec in the process; a lot of people see the process as still being very dark and dismal, even though the accord may go through and Quebec may become part of Confederation.

We think it is essential that we resume these discussions. We also think it is essential if we are put in the position where we are asked to come to the table with very concrete models of what we determine to be our own process of self-government, that those are given consideration, that the aboriginal agenda that goes on the table is given consideration.

In the five years of the process that we have gone through, we have not dealt with the aboriginal agenda since 1983. The only part of the aboriginal agenda that was dealt with was the extension of the conferences, where there were three conferences added over four years, to deal with the problem. That was included. That was the part of the aboriginal agenda that was adopted.

Since then, the discussions on self-government have been very limited to a learning process. In the five years of the process that we have gone through, we have had to go through and we have had to educate people on the very basics of who we are, first of all, as people. The historical knowledge that was being presented by the federal government was totally out of whack with the kind of historical documentation that we were putting forward. We are certainly not prepared to accept the Bering Strait theory as a matter of the question as to how we arrived in this country. We did not think it was fair that this kind of historical information should be supplied by the federal government and put on the table.

Throughout the process, we still maintained that the education that went on and the understanding that went on was very clearly starting to generate more response among people. It had a good and a bad effect. Some provinces were

moving more towards the positive aspect, some provinces were moving more to a negative aspect, but it did have an effect. For us now to say that we would not want to go back into a constitutional conference until a later date would have a very detrimental effect on us and the relationship that now exists with the different premiers, attorneys general and all the people who are involved in the constitutional process.

I think if there were some kind of political will that was available, there would be an opportunity for us, in the province of Ontario especially, to be able to sit down and work out some very concrete models of self-government; to be able to sit down and say: "When we are talking about control of our education or we are talking about control of our policing, these are the kinds of situations we would like to deal with. These are the barriers. These are the necessary components of impasses that have to be either removed or added so that we can give concrete proof to the Canadian public that we are not going to turn the country topsy-turvy."

Those are very easy processes to be involved in. The unfortunate thing is that in the constitutional process there is no process of that kind of development that occurred in the five-year process from first ministers' conference to first ministers' conference. That development stage was not there.

Now we are looking for the resumption of funding to flow back to the organizations so we can actually start that process, so that in 1990, if it is two years from now, we can actually go to the table and have those models. We can say: "Do you want to know what the impact of Indian self-government is? This is the impact. This is how it is going to change your law. This is how we feel it is going to change our community. These are the things that we should agree upon, that we see a joint responsibility in sharing. This is how we will work out matters."

I think in our minds it is clear that the kind of guarantees that we need to move in that direction are essential, because without the guarantees we are back to the treaty process. We are back to saying, "Yes, we will sign another agreement with you and we will trust you to implement it." We have no enforcement mechanism and we have no way of dealing with this situation other than litigation, and litigation certainly has not been one of our most rewarding processes to date.

**Mr. Breagh:** I know what it is like to sign an accord and then watch it fall apart.

**Chief Peters:** I understand. You were one of the drafters.

**Mr. Breagh:** Maybe that is the problem.

**Mr. Chairman:** Chief Peters, if I might, on behalf of the members of the committee, thank you and your colleagues for coming today and making your presentation and particularly for answering the questions so frankly in terms of what we might be able to consider in moving this whole issue further on the table. We are very grateful to you for that.

**Chief Peters:** As a last comment, Mr. Chairman, what we have tried to open up today are some of the questions in some of the areas that are of major concern to us in dealing with the kind of perspective that has taken us to this point in 1988.

We have additional representation tomorrow with the Anishinabeks and with the Association of Iroquois and Allied Indians, who will address some of the questions. I ask the committee to set its mind to some of the questions and some of the issues that we raised today. With the questions that you have not been able to ask today or have not been able to formulate in the discussions we have had, you will have the opportunity again tomorrow to be able to ask questions in that specific area.

**Mr. Chairman:** Thank you. I believe also you made reference to the problem at Kettle Point. I believe when we are in London, we are going to be hearing from them as well. I hope that will help our education as we go along. Thank you once again.

If I might, may I ask the representatives of the Congress of Black Women of Canada, Jean Augustine and Akua Benjamin, if they would please come forward. Just take a deep breath while we move around here. I apologize, but it seems as we get to the end of the morning or afternoon session, I am afraid we are always running a bit late. I hope you have found some of the sessions you have sat through as interesting as we have and we are grateful that you hung in.

On behalf of the committee, I want to thank you for coming. Perhaps if I might simply turn the floor over to you, we will hear your statement and then open it up to questions, however you would like to proceed.

#### CONGRESS OF BLACK WOMEN OF CANADA

**Ms. Augustine:** I am Jean Augustine and this is Akua Benjamin. Had we known that we would be this time, a number of our women who are presently very busy in the areas of occupation



where they could not get the time off might have been able to join us, but we are speaking on behalf of a good number of people whose minds and hearts are with us at this time.

The Congress of Black Women of Canada welcomes this opportunity to address our concerns about several sections of the Meech Lake accord, sections which, because of their lack of clarity, raise many questions for us. The Congress of Black Women of Canada is a nonprofit national organization established to focus on and bring due recognition to the role of black women in Canadian society. The Ontario region is composed of chapters and affiliates located throughout the province, especially in the urban areas.

The primary purpose and objectives of the congress are to plan and implement a program of education, service and action geared to the needs of black women; to work with other organizations on mutual issues and concerns, particularly those relevant to black women; to provide a network of support for black women of Canada and to advocate for meaningful social change aimed at improving the lives of black women and their families; and, lastly, to contribute in the creation of equality, justice and human rights in Canada.

We appreciate this opportunity to intervene at this public hearing because as black women in Canadian society we have serious concerns about the accord as it presently stands. We will not address all of the issues which create confusion for us, but we will focus on the four most pressing areas that alarm us, and I will name those areas: section 2(1)(a) and (b), which recognize French-speaking and English-speaking Canada as constituting a fundamental characteristic of Canada, and the recognition that Quebec constitutes within Canada a distinct society; sections 95a and 95b(1) and (2), which specify agreements on immigration and aliens; the section which refers to shared-cost programs; and, finally, we are concerned that the essence of section 15 of the Charter of Rights and Freedoms is omitted from section 16 of the accord, which addresses multicultural rights, and is weak in guaranteeing our rights on the basis of sex and race.

**1620**

Before doing so, we wish to comment on the process. I know you have heard, in the last two presentations, comments on the process, but we wish to comment again on the process.

The Meech Lake accord, from its inception, was developed with little input from women's

organizations across Canada. On this issue that will have a very direct and drastic impact on our lives, it is not only important that the consultation occur but that women's viewpoints be given serious consideration.

We are saying this because we understood our Premier's promise not to sign the accord until Ontarians were given the opportunity to respond. Yet, recently he has been recorded as saying that no real changes are possible in the accord and he is satisfied with it in its present state. Therefore, we urge the Premier, through you, to heed these consultations and the recommendations therefrom and have those recommendations reflected in his future actions.

Akua will take us to the major concerns.

**Ms. Benjamin:** As Jean has pointed out, one of our major concerns is clause 2(1)(a), the "fundamental characteristic" clause. Our concern in that is that the multicultural groups and others like native people are not included as part of the fundamental characteristics of Canada. Yet, their rights are enshrined in the Charter of Rights and Freedoms. We question the distinction that would give us our rights and freedoms on the one hand, in one constitutional document, while omitting us as a fundamental characteristic of this country on the other—meaning with reference to the accord.

Further, clause (b) of this section outlines Quebec as a distinct society and section 16 indicates that native and multicultural rights are not affected by this clause. However, we question the concept of "distinct society" being attributed to one province while no such distinctiveness is accorded to other provinces or members of other provincial groups. Inherent for us in this notion of Quebec as a distinct society is the notion of inequality between provinces and between groups.

We are further concerned about black women and their families in the province of Quebec who raise to us the following questions: Are they part of the distinct society or are they seen as members of the multicultural groups? What is their relationship as French-speaking Haitians, for example, to French-speaking Quebecers?

Section 95a and 95b(1) and (2), the agreements on immigration and aliens: We feel that under the accord this will not only allow provinces to negotiate immigration quotas, but it may well be that each province can select countries from which to draw immigrants. We are concerned that this allows a checkerboard immigration system where immigrants, or cer-

tain immigrants, are welcome in one province but perhaps not in another.

We feel strongly that this section of the accord will not only weaken the centrality of Canada as a country, but it will promote insularity between provinces, open the door to discrimination of one group or country over the other and, above all, violate mobility rights of Canadians, as outlined in the charter.

Section 106A, the shared-cost programs: We oppose this provision, which gives the provinces the right to opt out of national programs "if the province carries on a program or initiative that is compatible with national objectives."

As black women, we feel that all Canadians should be accorded the same level of basic services, as would be guaranteed by national programs. The vagueness of subsections 95(a) and 95(c), with reference to "national objectives" as a basis for shared-cost programs, worries us as a minority group scattered across Canada. Who determines national objectives? Can provinces not justify their own deviation from national objectives because of their own interpretation of the term? We feel extremely vulnerable by this clause.

At present we benefit from federally funded programs and services. These include language training, skills training, health care, welfare programs, etc. If these are placed under provincial jurisdictions, this will give rise to regional disparities and inequalities in the provision of these vital services and programs. Black women, because of their representation among groups that will need these services most, will be particularly hard hit by such provincial decisions to opt out.

Individual and equality rights: We are seriously concerned about the omission of equality rights and individual rights of black women and other women of colour as specified in section 15 of the Charter of Rights and Freedoms. We feel these rights are put at risk by the accord. Section 16 of the accord addresses multicultural rights as being protected from the accord's guarantees of linguistic duality and distinct society. However, multiculturalism has often been interpreted narrowly as cultural artefacts, without the weight of protection against "discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability" and all the other categories that are outlined in section 15 of the charter.

For us as black women, rights we gained in 1982 should not be rescinded through the Meech Lake accord. The accord should reflect the

interests and aspirations of racial-minority women, along with all other peoples across Canada.

**Ms. Augustine:** In summary, the parliamentary task force which produced the report *Equality Now*, documented and showed strong evidence of the level of racism in Canadian society. Our governments have moved to bring about measures to address this social ill; for example, the employment equity program coming out of Rosalie Abella's task force.

A constitution governs all other laws and all actions taken by any government. Our Canadian Constitution must also enshrine and guarantee the rights and freedoms of all its citizens, including those who belong to different racial and ethnic backgrounds. It must also protect its citizens against inequality, discrimination and injustice. This cannot be left to interpretation or couched in vagaries or ambiguities.

Black women and their families are woven into the Canadian fabric. We equally want to see Quebec's full participation in the Constitution to strengthen our nation; however, we urge that this be not attained at a cost.

**Ms. Benjamin:** The recommendations that we are putting forward are in line with our presentation. That is, we recommend:

That section 2(1) be changed to reflect the multicultural composition of Canada; that is, that recognition be also given to Canadians whose mother tongue is neither French nor English and that they also constitute a fundamental characteristic of Canada;

On immigration, that the federal government remain as the central decision-making body with respect to the admission of immigrants and that this clause in the accord giving powers to the province be deleted;

On shared-cost program, that the federal government retain again its centrality in the decision-making and funding of social programs and that the clause in the accord be deleted.

Section 15 of the Charter of Rights and Freedoms must be included in the accord.

Finally, we urge that in view of the omissions, weaknesses and negative implications contained in the accord, this document be carefully amended before ratification.

**1630**

**Mr. Chairman:** Thank you very much for a very specific and clear brief. I wonder if I could just begin, because this has come up a couple of times today and I would just like to make sure that I understand your position. This is with



respect to immigration and the role of the federal and provincial governments.

It was my understanding, from what others have told us about the section on immigration, that what was affected there was that the federal government could enter into an agreement, as it has with Quebec on immigration and as we have discovered it has done with a number of other provinces, but whatever that agreement was, it could not affect anything that fell under the charter. In other words, it could not designate that people could come only from country X and not country Y. It could say nothing about the racial or religious makeup of those people and, indeed, once someone arrived in a particular province, that person's mobility rights were protected and he or she could go anywhere.

I want to be clear here. I guess one suggestion is that these clauses in section 95 simply take what has been a policy agreement between Quebec and the federal government and a few other provinces and put this in the Constitution. One might argue, why do we need that in the Constitution? But it seemed to me when one looks at 95b(3) that the Canadian Charter of Rights and Freedoms application to this would, at least in this instance, meet the concern that you had about whether provinces could try to play games and alter either the ethnic composition or religious composition or any other element.

I would like to be clear on that in terms of your concerns with that particular section.

**Ms. Benjamin:** This is why we feel it is very vague and ambiguous. If there already exists agreement between the federal and provincial governments and that is enshrined in the charter, then why should it be in the accord? What we see in the accord, by making reference to immigration—and again the levels of immigration, the numbers, the countries that they should come from—is that it is subject to interpretation by a province, which may very well have negative implications in terms of the implementation of this particular clause in the agreement, if this already exists.

We do not have any problem with the fact that it already exists, but by putting it into the accord, we are saying then it is subject at this point to be interpreted and it is subject to be interpreted in a number of different ways. We are raising ways that it could be interpreted from henceforth.

**Mr. Chairman:** So your fundamental concern with that section would be that if essentially it said that, when the federal government determines that so many immigrants will be permitted into the country in a particular year and it works

out with the provinces numbers for various regions, if that is all it is—and that does not speak to ethnicity or religious background, a variety of other things—and if those people upon entering the country do have the same charter rights as you or I, then if that were clear, that would be acceptable.

**Ms. Benjamin:** If that were made clear—that is right.

**Mr. Chairman:** The problem you have is that if there is some ambiguity surrounding all of that, then you have concerns in terms of what might happen.

**Ms. Benjamin:** That is right.

**Ms. Augustine:** I think we can push it further to the notion of the distinct society and if Quebec is a distinct society, maybe in order to keep the distinctiveness one might look at certain cultural aspects, language and all the other things that would help to keep that society as outlined. I think there are a number of things which, when rolled together, do create some confusion.

**Mr. Offer:** I would like to thank you very much for your presentation. I think in bringing up the whole question of immigration, it is going to be an area which, I would suggest, probably as this committee continues, we are going to get involved in with respect to that one aspect in some very great detail.

I think there is concern in your submission, obviously, with respect to how the whole question of immigration is affected by the Langevin agreement. I think that as we go through the process, we will be bringing forth some of the aspects of the agreement and how this particular area is now administered in terms of the numbers of persons who come into the country.

This particular agreement, from my readings does not impact on that question at all in terms of immigration being, I understand, a shared responsibility between the provinces and the federal government. This agreement is really putting in the Constitution an agreement that in fact has existed in Quebec, for instance, for some years and agreements that have existed in other provinces in some degree or another for a number of years. I think that your concerns are important, and they are important for us to address. I would expect that we will be able to address those concerns as we proceed.

I would like to deal with your concerns on account of the question of multiculturalism and women's rights. I think you have brought out both of those concerns, which are related yet

distinct. We have heard in our committee that section 16, which you have brought forward, deals with sections of an interpretative nature, to make certain that regarding the whole question of multiculturalism and a distinct society, they are all used as interpretative tools as opposed to rights-giving sections.

The multicultural question will not be negatively affected under this agreement by virtue of section 16; it does not deal with rights but rather with how sections are to be interpreted. I am wondering if you can share with me your feelings with respect to section 16.

**Ms. Benjamin:** Before I do, I just want to speak a little bit to the whole question of interpretative versus substantive, because we have had a lot of discussion about this and it still is not clear to us which clauses are supposed to be substantive as opposed to interpretative. For instance, very often when we see a clause like section 16, and it is supposed to be interpretative, what has happened in practice has been that it has turned out to be substantive, or vice versa. So that is part of the confusion we have about that.

I will let Jean speak about the substance of what you are getting at, and that is this whole question of where does multiculturalism fit in and how do we see it in light of "distinct society" and the provision of section 16 itself.

**Ms. Augustine:** I am going to go in a very circular way, because I think part of this and part of the fact that we are having these hearings and these discussions is because there is so much confusion and lack of clarity in all of this.

Our community—when I say "our community," I am talking about the black community of both men and women—is not only the black Canadian community; it is not only a community of people who are native Canadians but also people who belong to the multicultural community. So a lot of the concerns for us are concerns around the whole notion of social integration, being part of Canadian society, etc.

We have through past experience, looking again at Canadian immigration practices and laws and through history—Canadian history has not been a history that has shown a lot of fairness and a lot of justice and everything else to various groups around the years. It is sad to make that comment, but it is part of our history.

Therefore, when we see something like the Constitution and we have confusion around certain clauses as to whether they are so or are not so, whether they are interpretative or substantive, we are a bit confused and we are concerned because, to use popular parlance, when the

crunch comes, it is the law, the legality that would somehow give us the necessary means to get justice for whatever our causes are.

**1640**

We want to see things clearly written out so that we know that this protects us in a specific fashion and not that it could be interpreted in this way or the other. I think this is the way I will answer this rather than go through it. I am not a legal person; therefore, I cannot tell you that this specifically says this. I am talking as someone who is part of the community, whose life will be affected very much by the accord, with court judgements and other things that are done by lawyers.

Interpreting this will affect me and mine and many others. I am sure there will be many legal people who will be coming before you, making the necessary legal interpretation, but I am saying to you as a community person—because I think these hearings are for people to come forward—that we feel very insecure and very much threatened because there are some things that are "notwithstanding" and some things that are not affected. Heritage is in here. Multiculturalism and social integration mean something else for us, on the other hand, and if this is not in here and it is someplace else, how do we put all of these pieces together?

I know this maybe does not make book sense, but at the same time this is the way we feel as we view this out in the communities.

**Ms. Benjamin:** Can I just elaborate a little bit on that? In our brief we talk about what has happened, particularly in the province, except for the last multicultural policy, which has changed somewhat. Very often the notion of multiculturalism has to do with heritage; it has to do with the fabric, the makeup, the composition of the society. Along with that are all the artefacts—the dress, the dance, the food—all the things that come along with being part of the culture.

Multiculturalism has not addressed the whole question of discrimination. It has not really focused on the difference in terms of treatment, participation or access that people have felt and experienced over the years. It has simply looked at people's participation in the society from that vantage point and has not looked at some of the issues and problems.

This is why, when we see the clause making reference to multiculturalism, it is not clear whether it is beginning to talk about discrimination, injustices, social inequalities—all the things that we know that these people who fall into this



category have experienced. This is why we feel that section 15, which says in all the categories, "Thou shalt not discriminate on the basis of race or sex"—

**Ms. Benjamin:** Plainly and clearly.

**Ms. Augustine:** Very clearly it is spelled out. We know that is a protection; that is there. It is written in the Constitution. It is clear. There is no quibbling about that particular clause. Individual rights are enshrined; they are protected. This is what we want to see reflected in the accord.

**Mr. Offer:** There are many who would say—and I would think most, if not all—that section 15 of the charter is not affected by this, that it remains as strong today as it was the day it was enacted. What we are talking about in section 2 with respect to the question of a distinct society and in section 16, dealing particularly with multicultural groups, is that the laws will be interpreted in such a manner, keeping in mind those aspects of our society.

I am very pleased that you really have come today and spoken to us in terms of saying, "Listen, we are just not sure as to how it affect us, how it impacts on us." I think that is important for this committee to know. I thank you because you have done it in a very clear and succinct way.

**Ms. Benjamin:** I just want to pick up on the last point. Our understanding—again very shady, very grey—is that there seems to be a hierarchy in terms of constitutional documents. This is one of the questions that we have. Does the accord take precedence over the charter or vice versa, or is the act of 1867 the document? We do not know in terms of the hierarchy where this one falls and how it will be interpreted, given that whole vagary at this point.

**Mr. Cordiano:** I want to say something because I think this is very fundamental and I just want to have a very brief supplementary question.

We are all trying to grapple with words basically, because that is what we are dealing with in the charter, in the accord, the Constitution Act, 1982 and in fact the Constitution of 1867. We all have to deal with the words and what they mean.

The legal experts who came before us—and I am not a legal or constitutional expert of any kind—tell us that section 15 says explicitly, "Every individual is equal before and under the law and has the right to the equal protection..." The word "right" is in section 15. If you look at section 27, it says, "This charter shall be interpreted..."

The kind of explanation that was given to me is that the words are explicit in these sections: A right is a right in section 15 because the word "right" is used. In section 27, it is not a right; it is an interpretative clause because the word "interpreted" is used. I think that made some sense to me.

The trouble I have with that—certainly the point has been made on a number of occasions, and you are making it again—is what do we mean by "multiculturalism"? When you are trying to interpret all of this, what is meant by that? Are there rights inherent for groups that are neither English nor French? Are there rights inherent there? Perhaps that is a problem outside of the accord. That is something that certainly I want to address as we go on and look to the process of a continuing kind of conference approach that may be implemented as a result of this accord.

If you look at what the Quebec "distinct society" means, I think in looking at what a fundamental characteristic of Canada means, you would also have to include in there that, certainly in Quebec, "distinct society" would also mean the various groups that are contained within Quebec; that is, the English-speaking minority and all of the other ethnic groups that exist in Quebec and that have existed there for some time and that will perhaps be added to. I think that is one interpretation that was offered to us.

I do not know if you agree with me on some of those points, but I just wanted to make those comments.

**Ms. Benjamin:** Again, in terms of black women, what does that say? What is distinctive about a black Haitian woman living in Quebec as opposed to a black West Indian woman living in Ontario? It would come down to that kind of basic question for us to grapple with. What does it mean that you have multicultural groups in Quebec having that whole character of being a distinct society as opposed to multicultural or other groups of people living in other provinces? That is what is very vague. What does it really mean as a distinct society, and what does it mean that this is a fundamental characteristic of Canada?

For us, when we talk about the notion of inequality—and again it is a simply a notion—are we putting one province above the other? Are we putting one group of people against the others? I know that the accord was not drafted quite that way. I understand that. But because we are not clear, these are the questions that we have.

I know a constitution cannot be as explicit perhaps as one would like, but we want the language written in a way that all this shadiness and these grey areas will be reduced substantially so that we know very clearly, when we talk about the distinctiveness of a society, what that really means. What are the mechanisms that are in place? What are the processes? How are groups seen in relation to others? I do not know if that means policy documents are going to flow or rules are going to come out of this perhaps, but we want something that would give us a sense of what it really translates itself to.

**Mr. Cordiano:** The difficulty that I have—I am sorry; I am going on, and I will not go on. I should give someone else an opportunity. Mr. Allen has been patiently waiting.

1650

**Mr. Allen:** They are all good questions and they are all good answers, well worth asking and answering.

While we are on that question, it is worth noting that section 15 of the charter not only has subsection 1, which makes the statement about "benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability," but also has a second subsection, as you remember, which would cope with the problem you might have if some people said: "But then you are engaging in affirmative action programs to do something for a minority group that is disadvantaged, for example, women who do not have equal pay for work of equal value, did not have before the law and still do not have," and so on.

There are some very fine shadings already in some of this language. In addition to Mr. Cordiano's point that came up in our discussions with some of the experts who came before us, it is important to realize that all parts of the Constitution are equally present to all other parts. That is, if the accord is passed, the provisions that are written in the charter are all automatically there with the accord. They qualify it at every point, so that it should be impossible to read section 2(1) of the accord relating to the distinct society without also reading section 15 of the charter in your head at exactly the same time.

That was quite reassuring to me because I was very concerned about many of the problems you have been raising. In particular, I was concerned about the whole panorama of minority groups that exist not only in Quebec but also in Ontario and every province and, in particular, visible minority groups that have had the greatest

problem in getting appropriate equality within our society.

I wonder if it helps at all to take the immigration section that you are raising and lay it beside the "distinct society" section. I just raise that as a question because it had not occurred to me until you were talking to us that the agreement the federal government has with Quebec is designed to underline a distinct aspect of Quebec society, probably the most distinct aspect in Canada, namely, that it is the only province in the country where French is predominantly the language of daily life. That is probably the only clear thing that comes out of this part of the accord.

If you look at the agreement with the federal government, it gives special recognition to Quebec's capacity to recruit and accept French-speaking people who come from French-speaking territories and countries elsewhere in the world. Inescapably, that has meant that Haitians, for example, whom you referred to in your statement, have come to Quebec to strengthen the distinct society of Quebec. One could say the same of people who might have come from Senegal or from Vietnam who are French-speaking. So that implicit in the strengthening of the distinct society has been an immigration understanding that has brought a greater multi-cultural character to Quebec. One would hope that alongside that, one would always read section 15 so that the equality dimensions of all that were constantly in play.

I put that all together just because I am trying to wrestle my own way through all this murky stuff to see where I come out. Does that give any new focus for things for you, or does it still leave problems? I am very sensitive to the fact that when you are there and you are in the situation and you are asking the question and you have your relatives and friends in Montreal and you have them here in Toronto, there are lots of things you see that I do not see.

**Ms. Augustine:** Before you delve into it, I am going to go back again to the point I made earlier, and that is the importance of something as a constitution and that we should not be speculating as to this, that, the other and the next.

This is really the problem I have with this, that we can sit around the table and we have sat around from the time this came on the scene. Depending on how we read it or depending on the political leanings or the ideological stance or whatever, we find all kinds of interpretation. We find all kinds of ways in which we can blend something with something else. We can pull



something from this and make it match this. We can use the goodness of our nature and say there is just no way we can leave out section 15.

Of course, we have to interpret those kinds of things here, but then we saw certain instances like Bill 30 in Ontario, the public school legislation. We found that they went back to section 93 or whatever in the 1867 act and overruled what was thought to be a clear charter. There were so many things, and this is the problem I have with all of this. This is why I think it is a bad document. I feel these hearings just give a bit of hope that at the end of everything else, we will see some amendment that would make it better.

**Mr. Allen:** How would you reword section 2(1)? What kind of language would you like to see in there that would help to define "distinct society" in such a way that it includes your special concerns? Would you want it done there or would you want it done somewhere else in the accord? Do you want something stronger than section 16 which is presently there and is sort of circular? It does not really take you very far.

**Ms. Augustine:** We should have brought our lawyers with us.

**Mr. Chairman:** Maybe not.

**Ms. Benjamin:** Once I understand all the ramifications of what "distinct society" means, then I would go ahead and talk about changing or amending that whole notion. But the concept itself of "distinct society" is not even clear to me, so I am not clear on how to follow up with wording it differently or placing it in some different way.

What confuses me even more as we speak is, when you place the "distinct society" as one clause and you talk about individual rights for Quebecers, what does that mean? Do group rights take precedence over individual rights? There is so much vagueness to that. What does that mean in terms of the rest of Canada? They have distinct rights and they also have individual rights. What does that actually mean? That is one thing that bothers me.

The other thing is the whole immigration question. When Quebec argues that it wants a five per cent increase in the quota numbers, does that mean that Quebec is going to be more multicultural than the rest of Canada? To us, this is where we begin to talk about the checkerboard pattern of immigration. You have one province that seemingly is going to look one particular way as opposed to other parts of the country.

When people migrate—at least, when we migrate, we migrate to one country. We do not

migrate to a province. We may choose a province based on a number of different criteria—families may be there, or language or access to jobs may be there—but it is not simply based on the fact of helping to develop one part of the country in a multicultural way as opposed to another. So I have problems with that whole notion of Quebec having five per cent.

I am saying all this because it comes back to what we understand about the "fundamental characteristic" clause, which we feel should be reflective of all the people who live in the country. If it is a recognition just based on language groups of English and French, although those are the two national languages, there is recognition of that or there should be recognition that we have two official language groups. But does that mean that is the fundamental character of the country? What about other people whose mother tongue is neither English nor French? That is recognized in provincial statutes, at least in this province. We talk about all the different language groups we have. Where do they fit in?

**Mr. Allen:** Those are very good questions; they are all very fundamental questions. If you can solve the problem of the relationship between individual rights and collective rights under our Constitution, you have done better than just about anybody else who has had a crack at it. It really is a very complicated question, very involved.

My own sense of sympathy does suggest that there is something legitimate about collective rights of a province that has a different character in terms of its language, its civil law traditions and attitudes on a whole range of questions, without giving up the ghost on equality questions and things like that. Those are ongoing debates, and we always have to struggle to make certain that it all comes out right. I guess that is what we are all here for, to make sure that it happens right.

You are raising some very basic and important questions for us. I really appreciate your coming and putting them the way you have.

**Mr. Chairman:** As we move through in this committee, we think we have heard about a certain area. We go off and have lunch or supper and have a good sleep and we say, "Gee, I think I understand that." Then along come more people to raise more questions that themselves raise questions. But I think that is what a large part of this process is really about, to raise those concerns.

You have certainly brought a perspective that is new for us to this point in the hearings. While we cannot answer all your questions, I think it is

very good that you have posed them and that you have added some dilemmas for us to wrestle with. We very much appreciate your taking the time today. Again, I apologize that we got behind schedule, but certainly from the committee's point of view, the time has been very much

justified by what we have received. We thank you for coming.

We stand adjourned until 10 o'clock tomorrow morning.

The committee adjourned at 5:03 p.m.



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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Chairman:** Beer, Charles (York North L)**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

Breaugh, Michael J. (Oshawa NDP)

Cordiano, Joseph (Lawrence L)

Elliot, R. Walter (Halton North L)

Eves, Ernie L. (Parry Sound PC)

Fawcett, Joan M. (Northumberland L)

Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Substitution:**

Sterling, Norman W. (Carleton PC) for Mr. Harris

**Clerk:** Deller, Deborah**Witnesses:****From the Social Planning Council of Metropolitan Toronto:**

Patterson, Jeffrey, Senior Program Director

Coles, Stuart, Elected Vice-President, Board of Directors

**Individual Presentation:**

Barnett, Gayle

**From the National Congress of Italian Canadians:**

Castrilli, Annamaria P., Lawyer; with Houser, Henry, Loudon and Syron

Delfino, Angelo, First Vice-President, National Level

**From the Toronto Jewish Congress:**

Lenkinski, Lou, Chairman, Social Policy Committee

Scheininger, Les, Past Chairman and Member, Social Policy Committee

**From the Ontario Confederation of University Faculty Associations:**

Starkey, Dr. John, President

Epstein, Howard, Executive Director

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**From the National Union of Provincial Government Employees:**

Clancy, James, Vice-President; President, Ontario Public Service Employees Union

Brown, Larry, Secretary-Treasurer

Usher, Sean, Director of Special Operations, Ontario Public Service Employees Union

**From the Chiefs of Ontario:**

Peters, Chief Gordon, Ontario Regional Chief

**From the Congress of Black Women of Canada:**

Augustine, Jean, National President

Benjamin, Akua





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No. C-6

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Thursday, February 18, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, February 18 1988

The committee met at 10:05 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** I will call the morning session to order. We are going to alter our order. Our first witness is not here as yet, but Mike Boychyn, who is also to appear this morning, is. In order to move forward, if I might invite Mr. Boychyn to the table, we will let him begin with the first presentation. I believe his presentation is being circulated right now.

Thank you for coming, Mr. Boychyn, and for being here early so that we could ask you to fill the gap. I will turn the floor over to you. If you would like to proceed with your presentation, we can ask some questions when you have completed.

### MIKE BOYCHYN

**Mr. Boychyn:** My name is Mike Boychyn. I am a concerned retiree. I wish to express my gratitude for this government-citizen relationship. The popular vote arrived at through dialogue has been the imperative and the meaning of our democratic form of government, our pride of distinction from other forms of government as devised by people throughout history.

A veto wielded by an individual or a minority is destructive of our democratic principles. Our Prime Minister, Mr. Mulroney, has handed to our 10 recognized provinces just such a conspiratorial potential. Only through the strength of the vote of the majority of Canadian premiers could any future renegade aspirations such as separation, which would be the ultimate meaning of the words "distinct society," be set to rest. The democratic vote, not the impediments of the veto, would have the necessary tempering effect to rein in any renegade aspirations within the Canadian Constitution of a federated Canada.

Prime Minister Brian Mulroney has expressed his confidence in his monetary controls that the federal government can resort to for effective control of numerous provinces. Canadian loyalty and confidence should be based more solidly on the legal and constitutional law. The current shift and economic financial realignment programs become very unpredictable. Some provinces

have already made suggestions and veiled threats of foreign co-operation towards such aspirations.

It is in this spirit and concern that Canadians across the country are asking whether the Meech Lake accord is that bad. In Canada's past history, the then Prime Minister Pierre Trudeau stated that the federal government should not be a valet or a servant to the provinces. In a democracy such statements should be rejected outright. It remains the upward mobility of grass-roots decisions through the provinces to the federal level of government.

Fears are expressed that weakening of the federal government powers would make it incapable of enacting broad federal legislative and social programs favourable to the Canadian public. We must not forget that unfavourable legislation would be less likely to be rammed through. Provincial accord would take on greater significance in moderating a predominantly federal runaway power grab. Had powers that spring from provincial sources been established instead of being just in the present beginning stages, our present trade situation might not have been as precarious. Provincial influence that is closer to grass roots is more easily guided by public expression in the influence of federal policy.

It is for the present lack of credibility our federal Conservatives have earned that we oppose the Meech Lake accord. Provincial government nominees for appointment to the Canadian Senate would offer a greater mix of talent and objectivity. They may periodically be considered for reapproval and not act as lifelong retirees. Such senators would owe dedication not out of patronage, but to Canada generally.

### 1010

In a democratic country political control is based in the hands and the trust of our inhabitants, not on monetary and military enforcement. Canadian citizens, regardless of population density, are trustees of the regions of Canada they find themselves inhabiting. If we seek to diminish their representation because of sparse population, we diminish our accord and our territorial integrity. Our problems with the veto may not be the limited interpretations we may attempt to attribute to the veto.



I might explain that. I got a letter after I had written this and one of the members of Parliament suggested that the veto has limited interpretations, but the precedent is in my estimation dangerous. Our concern must remain with the examples the veto sets. Some of our future governments might prove even less credible than our present predicament. Such governmental ambitions may construe broader applications and definitions in an established veto. We have simpler ways of saying we prefer in certain instances unanimous support.

At the risk of repeating myself, it is to draw attention to a danger that remains within the present proposal for the adoption of the Meech Lake accord, that is the veto power being granted to the provinces. The veto has the necessary potential of each province to become independent, or balkanized. Every effort should be made to amend the veto to a simple vote and consensus of the majority. Veto powers run completely counter to dialogue. If such is not the case, what power does the veto possess that encouraged even the objecting provinces into the accord?

The federal-provincial conference is slated as a consultation process for proposals. The way this accord has been presented to the Canadian public as binding legislation not subject to amendments and ratification. The whole process has gone over the heads of our elected representatives, both federal and provincial, a substitute provisional government, at a time when Canada has a constituted government.

The cross-country hearings should not be viewed as just a passive exercise, rather the delegations representative of numerous Canadian people should be viewed in terms of either ratification or rejection of the Meech Lake accord and to consider any proposed amendments. All Canadians should reject this instance of the federal government's own veto. In effect, when they refuse any changes, my concern is that it is a veto in itself. This power block approach on the part of the Prime Minister and the Premiers would set a dangerous precedent for succeeding similar legislation.

Decentralization of federal powers seems to have been misconstrued by Brian Mulroney to mean the dissolution of the federal government to relinquish its responsibility. Good management on the part of our federal government should be a greater commitment and responsibility towards the provincial delegation of authority. In other words, the provinces just delegate their wishes and the government should co-ordinate.

To indiscriminately submit federal programs to the diversity of the provincial whims and conflicting interpretations can lead to competition towards the dissolution of social programs. Antagonisms will arise that will dwarf the "distinct society" issues we are now confronted with. The ensuing parting of provincial ways will in itself lead to the balkanization process.

Equality rights and the distinct society, if we are to go by the definition of the English language and not descend into educated illiteracy, the word "distinct" in conjunction with the word "society" should not be taken to mean the same as individual distinction and rights.

The word "entrenched" means irrevocable and should be construed as such in any dispute. The entrenched Bill of Rights should be above reproach as far as any other legislation, in this case the Meech Lake accord, is concerned. The definition of "distinct society" would come into direct conflict with the antidiscrimination laws in our society. "Distinct society" is also a complete contradiction of our rights to equality.

Equally important under the review of our constitutional amendments clause, we may have to break new ground in this instance. My concern is that to the best of my review of the various oaths of office our Prime Minister and our members of Parliament pledge to Canada and all Canadians, the word "democracy" is not included within these oaths.

Canada and our western world proclaim to the world our dedication to our democratic form of government. To many Canadians, our maple leaf flag and the beaver will ring hollow without the inclusion of the word "democracy"; nor should democracy be taken for granted. The addition of an amendment is of the utmost concern to include and prominently proclaim in our oath of office the word "democracy."

**Mr. Chairman:** Thank you very much, Mr. Boychyn, for taking the time to put together your comments. I wonder whether I might start the questioning. With respect to the veto, do you see some need, with respect to certain matters where there would have to be unanimity, or do you feel that should not exist on any aspect?

**Mr. Boychyn:** I see a unanimous choice being preferred, but we have that in the consensus vote. Only when it is arrived at through consensus do I see the democratic process. A simple veto can overrule a majority and, in that instance, it does not apply to a consensus.

**Mr. Chairman:** You would prefer to see that worked out politically.

**Mr. Boychyn:** Right. Through dialogue and voluntary support, not intimidated support.

**Mr. Allen:** Thank you, Mr. Boychyn, for obviously thinking long and hard about the Meech Lake agreement and its problems. I think you have given us a fairly compressed statement of your position on a number of matters.

I was a little bit confused, but perhaps you can help me. At one point early in your paper, you were suggesting it was extremely important that our constitutional processes bed down on provincial and local governments that are close to people, because that is where the base of democracy lies. Then later on, on page 3, you write: "To indiscriminately submit federal programs to the diversity of provincial whims and conflicting interpretation can lead to competition towards the dissolution of social programs."

That seems to go in the other direction; to say that somehow what comes up out of the provinces, the diversity of the democracy that is there, is going to create chaos in our federal programs. Am I understanding you correctly on both those points? In your mind, is there a contradiction there or have you an explanation for me that would help me hold those two ideas together?

**Mr. Boychyn:** There does not seem to be sincerity on the part of the federal government to work on the basis of teamwork. If there is not the teamwork necessary between the provinces and the federal government, the diversity that the provinces could create would lead to the chaos I am suggesting here. In that instance, good management on the part of the federal government could conciliate the differences.

**Mr. Allen:** Again, you would turn to a political solution of conciliation case by case, rather than formalizing this process too closely in a document like Meech Lake. Is that your point?

**Mr. Boychyn:** The federal government, in my estimation, should act as an arbitrator and an adviser to the provinces. In that sense, it would create the teamwork and the spirit necessary to keep a unified Canada.

1020

**Mr. Allen:** Second, if I read you correctly, you consider the danger that comes from the Meech Lake accord's expansion of provincial roles in federal institutions to be more significant and more dangerous than the "distinct society" clause?

**Mr. Boychyn:** The provincial government should have input into the federal sector in an advisory capacity and a unifying capacity. From

the grass roots up, the wishes of the public would jell in that sense if there was the spirit and the desire on both the federal and provincial governments to work as a team.

**Mr. Allen:** But you see the Meech Lake arrangements somehow militating against that.

**Mr. Boychyn:** Yes, I do. The divisiveness of it.

**Mr. Allen:** You see those aspects as more dangerous than the "distinct society" clause?

**Mr. Boychyn:** That is right; by far.

**Mr. Allen:** In that respect, you did note that there were some—did I read you correctly in your second paragraph that there appears to you to be a separatist independent implication in the "distinct society" clause? Is that also your concern?

**Mr. Boychyn:** If the Canadian Bill of Rights predominates, which I think it should, the "distinct society" has no meaning, in my estimation.

**Mr. Allen:** So from your point of view it would really be a kind of interpretative clause rather than something that is very substantial.

**Mr. Boychyn:** Right, and it does not apply to individuals; it distinctly mentions society. A unifying factor if they so wish.

**Mr. Allen:** I see. That is interesting. Thank you very much.

**Mr. Offer:** I would also like to thank you very much for your presentation. To carry on with some of the questions Dr. Allen first brought forward, you talked about the "distinct society" clause in your opinion having really no meaning.

**Mr. Boychyn:** Yes, if our Bill of Rights predominates and the word "entrenchment" should have the meaning that is intended for it, the Bill of Rights should predominate in all instances and the "distinct society" clause in that instance has no meaning.

**Mr. Offer:** If that is correct and the "distinct society" provision is merely to be used as identification or interpretation, you would have really no concern with respect to that particular clause? Is that correct?

**Mr. Boychyn:** No.

**Mr. Offer:** If that were the case, your statement at the end of page 3 that "'distinct society' is also a complete contradiction of our rights of equality" would not hold true because it is just an interpretative matter and could be used as an aid for the courts in determining matters.

**Mr. Boychyn:** It will still remain as a conflicting type of understanding. It is a conflict-



ing type of understanding. It is up to the courts how they decide, but if we are to take the meaning of the English language seriously, I think the courts would recognize it in its proper context.

**Mr. Offer:** You are assured in that respect that that is the case?

**Mr. Boychyn:** I am not sure that the courts will do it, but it is up to us then as democratic citizens to see that the courts do make the interpretations that are meant for it.

**Miss Roberts:** I would like to clarify two points. With respect to the Senate, you feel that the provincial input is going to be helpful with respect to that?

**Mr. Boychyn:** I think it is far preferable to the method we have now. To do away with the Senate is a different story, but if we are to put up with the Senate, then I would suggest the diversity that would arise from the provincial levels would be of better advantage than the patronage appointments that are made for life.

I would like to recommend that senators be reviewed or not be put in for life. I think they lose some of their aspirations towards Canada as a whole on the basis of a patronage appointment.

**Miss Roberts:** I note you did not deal with the judges, or not that I recall, with respect to the appointment of judges as well to the Supreme Court of Canada. You have no thoughts on that.

**Mr. Boychyn:** No; that is out of my area.

**Mr. Sterling:** Just following along on that, do you not think that by moving the appointments from federal appointments to provincial appointments you are only moving the location of the patronage? I mean, all you are doing is saying, "The federal government can patronize whomever they like in the one instance, and in the other case it will be the provincial government." What is the difference?

**Mr. Boychyn:** The provincial governments are made up of various parties, and if they put forward candidates for appointment by the federal government, they are putting up diverse candidates. The predominance of one party in the federal cabinet right now would have the tendency to appoint senators from one party rather than from diverse parties. I do not think we have the diversity and the interest if it becomes a one-sided Senate.

**Mr. Sterling:** The only concern I have, sir, is with our present structure. I was most concerned about the involvement of the Senate with the recent drug bill and its holding up of that piece of

legislation for a long period of time, whether you agree with the drug legislation or not.

**Mr. Boychyn:** Yes, I know.

**Mr. Sterling:** My concern is that, with the provincial governments appointing or suggesting appointments to the Senate, the senators would then think they had a mandate that they do not have, and that is that they have never been elected by anybody to do that particular job.

So I have a great deal of concern in terms of tinkering with the Senate system without looking at it in an overall context. That is why I would object to the change. I would rather have an impotent Senate, as I think we do now, than have a Senate that thinks it has a mandate, which is what I am afraid this proposal leads to.

**Mr. Boychyn:** The entrenched identity of this past Senate I cannot be responsible for. My suggestion is that there should be a revision, and that if there is a Senate at all, it be a second opinion, not a commitment on any part, just a second opinion.

**Mr. Chairman:** Thank you very much, Mr. Boychyn. You have touched on a number of issues. We have your presentation and we appreciate your coming this morning.

I might next call upon Harry Doxtator, the president of the Association of Iroquois and Allied Indians. If you would care to come forward, and any of your colleagues, please come. I might ask you, Mr. Doxtator, if you would be good enough to introduce the others at the table. Then we will turn the floor over to you to make your presentation, and we will follow up with questions.

1030

#### ASSOCIATION OF IROQUOIS AND ALLIED INDIANS

**Mr. Doxtator:** Thank you. This is Gordon Chrisjohn. He is our tripartite co-ordinator. He works with our association on the federal-provincial agreements affecting Indian rights on reserves. This is Burt Kewayosh, executive director of the association. We do have some of our members in the audience as well.

First of all, I guess we had better give you a brief explanation of who we are and where we are. We are the Association of Iroquois and Allied Indians. We represent eight first nations in southwestern, southeastern and mid-northern Ontario. That includes, as our name implies, Iroquois and allied Indians, the Ojibway, Missis-sauga and various other denominations of Indian people in Ontario.

I just wanted to thank the committee for allotting us this time to make a presentation. We are very appreciative of the time you are offering to the native membership in Ontario to voice its concerns with the Meech Lake accord. You have already heard the regional chief of Ontario yesterday, Gordon Peters. Our presentation is basically along the same line, but with the way we feel it affects our organization at this point in time. I believe you have copies of the information. With that, I will just read through it and go from there.

This is the submission of the Association of Iroquois and Allied Indians to the Ontario select committee on Meech Lake, February 18, 1988.

I would like to take this time to thank the committee for allotting us time to voice our concerns about the Meech Lake accord. As you know, my name is Harry Doxtator. I am the president of the Association of Iroquois and Allied Indians. We are an organization of first nations, which are predominantly Iroquois, but our membership includes the Ojibway, Pottawatomi, Mississauga and other aboriginal peoples. As such, we feel it is our duty to present opinions based on a variety of aboriginal outlooks.

Far back in the history of contact with Europeans, the Iroquois people established the principle of each of our nations governing our own people without interference from the other. This principle is expressed in our two-row wampum. As such, we view the Meech Lake accord as a means to unify our government. Nevertheless, we view with concern the potential effect on our governments.

Our long-standing relationship with the crown of England is important to us. Though we have a long history of contact with the people of Ontario, we are given to understand that it is with the federal government of Canada that the crown of England resides, complete with trust responsibilities and pre-Confederation treaty obligations.

Because of this, we are concerned when the accord shifts power away from the federal government, our trustee, to the provinces, who appear to know little of, or care little for, the special considerations to be accorded to us. It will be provincial nominees who will sit on the Supreme Court, often considering the legal interpretation of our rights. The provinces can choose to determine our access to federal social services programming.

The Meech Lake accord recognizes Quebec as a distinct society. We appreciate this and understand it well. We have constitutional recognition of our distinctness. The Penner

report on Indian self-government in Canada has provided an impetus to the movement to consolidate and implement our own distinct nationhood, yet the first ministers' conference and this accord have been silent on the subject. Thus, we view the acceptance of Quebec's distinct society, still in an undefined form, as both an example of the unification of your government and a closing of ranks against ours.

The accord would require unanimous consent of all the provinces before the creation of new ones. Aboriginal people in the north, who constitute a majority, could be prevented from becoming provinces and joining Canada in the same spirit of Confederation as the present provinces.

Provincial opposition to our participation, either as equal provincial partners in Confederation or as self-governing nations with separate jurisdictions, has perplexed us for many years. It is clear that they believe us to be distinct societies, but societies to be assailed. We are instead nations that have been subjected to cultural warfare. We have been kept in poverty; our language and customs have undergone restrictions; our land base has been reduced; our rights have been undermined and the jurisdictions of our governments have been curtailed.

Rather than recognize our rights to resume responsibility for our own people, the provinces have opposed this. This would condemn us to poverty and ignorance. We grope for reasons why the provinces prefer this. Surely there is nothing to fear from a disadvantaged group such as the first nations.

We feel instead that the provinces do not believe in our rights or that they believe far more strongly in the concept of provincial dominance. A clear illustration of this attitude can be seen in Ontario's attitude within the aboriginal fishing issues. Ontario challenges all opposition to its total dominance of this area.

One of our member nations, Batchewana first nation in the area of Sault Ste. Marie, is a signatory to the Robinson Huron treaty, which guarantees the full and free right to fish in our waters. The Constitution of Canada guarantees our rights. Nevertheless, our commercial fishermen are charged by the Ontario Ministry of Natural Resources.

But that is not the end of it. We have won the case. Our rights were recognized by law. The provinces nevertheless appealed the decision. That appeal will be heard next week here in Toronto. We can hope that a victory for the aboriginal point of view there will be sufficient



for Ontario. They did not believe in the Robinson Huron treaty, or in the Constitution of Canada, or in the judicial opinion on our rights. They do not seem to believe in any opinion which posits that they are not the sole and absolute voice in the fishing rights issue.

We have tried to negotiate the mechanisms for implementation of our rights to fish. Ontario has refused, citing the opposition of user groups in Ontario. We believe this demonstrates either a lack of intestinal fortitude on the part of the government of Ontario or a fundamental lack of belief in our rights. If the government believed in our rights, or if indeed it were the right of another ethnic group, could the government of Ontario not find the political courage to tell the other groups, "These people have rights; their rights are theirs, and not subject to your approval or modification?"

Is this the point of the Meech Lake accord? Is it intended to recognize the distinct society of only one of the groups contributing to the fabric of the Canadian nation? Is it in many ways a mechanism for the rest of Canada to close ranks against the aboriginal peoples? It can be, but it need not be.

We suggest that there be added to your acceptance of the Meech Lake accord a commitment to further first ministers' conferences on aboriginal rights. Moreover, a policy should be formalized and implemented to include aboriginal representation on first ministers' conferences which deal with the issues that concern aboriginal peoples and their rights. Thus, the Meech Lake accord unifies your government without threatening the establishment of Indian self-government in Canada.

**Mr. Chairman:** Thank you very much for that presentation. As you noted at the beginning, Chief Peters was here yesterday. There are a number of organizations that will be appearing before us, but I think, as I say, that repetition does not hurt on some of the fundamentals in terms of helping us understand the views you have.

**Mr. Duxtator:** Yes.

**Mr. Breagh:** I just wanted to pursue basically one area of discussion with you this morning. We had a federal joint committee make a recommendation about a first ministers' conference in 1990 to deal with aboriginal rights. Yesterday Chief Peters said he thought that was a good idea and that, in fact, aboriginal people could put together the structures, the examples for self-government by that time. A number of other people have suggested that there are

outstanding issues before the courts, and those decisions will be reached by that time.

In my most reasonable mode, which does not always come about, it seems to me that we have before us an opportunity here that consensus may emerge, that other decisions may be made, so that some time between now and a date in 1990 the first ministers of this country could in fact sit down and do what they ought to have done many years ago: if not come to a final solution on aboriginal rights, at least get it on to the final track.

I must tell you I find that a very attractive proposal to kind of get behind. The problem I have with it is that if we lose—if that does not work, if the Meech Lake accord goes into effect without some such process being at least identified, never mind a final solution—it appears to me that we put a lot of people at a severe disadvantage and that we may have lost the final opportunity.

Now, I suppose you cannot get absolute about this. Nobody has lost the opportunity to go to court, for example. Nobody has lost the opportunity to use political clout, for example. Maybe we have had enough first ministers' conferences on aboriginal rights to tell us it is worth one more shot, but not much more than that.

I would be interested in hearing your position on whether that is an option which we should try to exercise and how fruitful it might be.

**1040**

**Mr. Duxtator:** As a representative of the first nations that I represent, I believe we would certainly welcome the opportunity for the joint committee's recommendations to be approved by the federal government and possibly supported by this committee here. In order to come up with the positions and papers required, it certainly does require some financial considerations, and those are one of the primaries that we would have to be looking at in order to prepare our documentation for that.

As far as the first ministers' conference in 1990 is concerned, I can support that as well. We have, as you have made us aware, been through five years of it from 1980 on until the spring of last year. In 1990, if the proper financial resources are available to us, we can provide that information for the first ministers. With regard to having a one-shot deal at it, that is definitely a possibility. The first ministers and the Prime Minister are the people who call those meetings on behalf of whatever the agenda might be at that point, but we certainly would welcome an

opportunity, I believe, to reinstitute our agenda as aboriginal peoples in Canada.

**Mr. Breagh:** Let me just give you one final little question, and you touched on it. One of the vexing things—and I will use last year's conference as an example—is that a number of people I know who have worked for a long time on this pretty complicated problem thought they had learned enough about the process, made enough contacts, understood what a first ministers' conference was like, how it functioned and the kind of power schemes that flow through it, that they really felt they could go to a conference of this nature and make their case, that they were getting close to, if not equal footing, being competitive in that league. I use that sports analogy.

The concern I have is that we have tried this approach on a number of occasions. As an outside observer, I would say that what happened was that we let groups come in who were unfamiliar with the process—a totally foreign process to them—of the first ministers' conference, groups who had not done battle with the bureaucrats in quite this way before. They had certainly battled bureaucracies for a long time, but they had never seen the full army in dress uniform with its new nuclear weapons out there.

How fair is it to say that we will pin our hopes on a first ministers' conference—that format—and that we will try to let aboriginal groups from across the country come and address the issue in a forum which is not theirs? To turn it around: If we said, for example, that all of the federal bureaucrats will leave the conference rooms in Ottawa and we will go to a reserve somewhere, we will speak a language which is neither English nor French, we will use a format that you have never seen before in your life, and we will not even tell you who the power brokers are on this reserve—you will have to find that out after you get there—the bureaucrats would scream, "This is horribly unfair; this is wrong; this deprives us of our constitutional rights; this is just awful." And yet we have done that to our aboriginal peoples repeatedly.

**Mr. Duxtator:** That is right, yes.

**Mr. Breagh:** Give me some idea of whether you think you can in fact use the first ministers' conference as a reasonable forum to present your case.

**Mr. Duxtator:** I think the first ministers' conference is basically one of the highest courts in the land. That is where the decisions are made on behalf of the Canadian people. Of course, there is a Supreme Court of Canada above that,

but I think the first ministers of this land are the area where we have to present our case. We, as aboriginal people, as you have indicated, are in a foreign setting in that particular situation, but I believe that our people have come a long way education-wise and politically. Some of our political leadership has gained some very good political street smarts for the politicians in this country.

I would say it is probably unfair to us. Yes, I would tend to agree with the analogy that you put to us with regard to taking the MPs and the premiers to a reserve somewhere and using our language. Just as they would claim that is unfair, I would have to claim that as well at this time. But I do have a lot of respect for our political Indian leadership at this point. We know our case, and I feel we can present it to the people concerned. It is just that for some reason they are not listening. We have been at it for five years, and they are just not listening to our comments and making rational decisions on those comments we are making. I think, if it was possible, it would be a good idea to get these fellows out on the land as we have been for years and years.

**Mr. Breagh:** I just have this vision of a first ministers' conference being held somewhere in the middle of the Ontario wilderness—

**Mr. Duxtator:** On our land.

**Mr. Breagh:** Yes—where some are comfortable and some are not. I wonder how the chief bureaucrats would do without access to their computers and eight million staff people and the hotel suites. It might be interesting.

**Mr. Duxtator:** I do not know.

**Mr. Chairman:** An interesting thought. I have Mr. Allen with a supplementary, then Mr. Cordiano, Miss Roberts and Mr. Offer.

**Mr. Allen:** Just a brief supplementary on that. I think in the course of my colleague's questioning there was at least an implication that there were possibly other routes that might be available to you other than going the route of the first ministers' conferences. I think it is important for this committee to have your sense as to whether in fact there are other routes. The courts are obviously one. But, that to one side, if we do not manage and no one manages to secure an amendment to the first ministers' agenda which specifically includes you in that agenda for subsequent meetings, are you then bereft of further access to process, or are there other ways?

One of the problems of the patriation of the Constitution, I guess, was that it reduced the access to the British Parliament, which might



have been another ally in the process. But, as you indicate yourself, that is now totally established within federal domain. Does the federal government have unilateral powers that you could prevail upon, for example, to force the issue? What are the alternatives?

**Mr. Duxtator:** I guess it would be again up to the Indian leadership of the country to continue to promote our concerns with the general public of Canada. If our ideas could be promoted strongly enough and we had enough support—election time is always a good time to get some support—we could get these people moving in our ways. Barring that, there is always the international forum, I guess, and we have taken steps in that area already.

As long as there is an Indian concern and we are here, there will be a process whereby we will continue to promote our concern and make sure, hopefully, that the people of Canada hear us. We will always be there to make our presentations as aboriginal people of this land.

**Mr. Allen:** All those roads lead back to getting on to the agenda.

**Mr. Duxtator:** Right.

**Mr. Allen:** If it comes later, why not now? That is the question.

**Mr. Duxtator:** Right.

**Mr. Cordiano:** I want to touch very briefly on a point following up on what Mr. Breaugh had to say, just for my own clarification.

There is, as you know, a provision in the Meech Lake accord for annual first ministers' conferences; I believe there should be one held this year prior to the end of the year and, proceeding on that, each year. I am just wondering if these conferences are the best means by which you can make your case as aboriginal peoples, as native peoples. Or do you think that conferences on aboriginal rights are the appropriate mechanism?

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I am trying to understand how you would make your case known. Essentially, we have a new process in effect here. For the first time, we are recognizing that we are going to have annual constitutional conferences. Is that something that you foresee as useful and beneficial to you? Each year, if you can envisage this, people will be making their case to the first ministers, who of course are going to set an agenda to discuss issues. We are trying to grapple with the whole process question and what we can do to enhance that if we are called upon as a provincial

Legislature to intervene somewhere in that process.

**Mr. Duxtator:** Just to reference the previous question, we have to get back to the aboriginal agenda, certainly, in order for the first ministers at this conference to hear us. As for the yearly conferences they are proposing at this time, it would be my suggestion that if there are agenda items that we feel would be affecting our lives in Ontario or in Canada, then we would certainly want the opportunity to be part of those first ministers' conferences to address that particular issue at that time. I believe at the yearly conferences they will be calling there will be a maximum of two to three agenda items or something along that line.

**Mr. Cordiano:** Right.

**Mr. Duxtator:** If those agenda items did not have a direct effect upon us, then certainly the first ministers probably could go ahead and have their meeting, but we would want the opportunity on agenda items that would affect Indians living on reserve.

**Mr. Cordiano:** To deal with aboriginal rights then, perhaps you would have to have one agenda item for that particular year. In the past we have had first ministers' conferences which dealt exclusively with aboriginal rights.

**Mr. Duxtator:** As a package.

**Mr. Cordiano:** Right. Because we now have annual conferences, I am just wondering if, in addition to the annual conference meeting, we are going to have additional aboriginal rights conferences.

**Mr. Duxtator:** We certainly would promote the idea of aboriginal rights conferences just to keep our ideas forward. But as far as Meech Lake is concerned, just to reiterate Mr. Peters's presentation yesterday, there are five items that we, as Indian people in Ontario, must stress. I will just review those quickly at this point.

They are: (1) constitutional recognition as self-governing first nations; (2) review of the constitutional process for the unfinished aboriginal agenda; (3) a guarantee of protection for first nations against the opting-out provision for national programs; (4) removal of the unanimity requirement for establishment of new provinces; and (5) a guarantee of aboriginal participation in other first ministers' conferences on issues which directly affect us.

That last one is basically the area we are discussing right now.

**Mr. Eves:** I am actually just going to follow up with sort of a supplementary to Mr. Cor-

diano's question. If I understand you correctly, there are basically two things you would like to see with respect to the future in your pursuit of self-government. You would be happy if this committee somehow could recommend that future first ministers' conferences with respect to aboriginal self-government be guaranteed, and if any further first ministers' conferences, as they are laid out in the accord, deal with items or issues that affect your people, you would want to be recognized and able to attend at the bargaining table.

**Mr. Duxtator:** Those two items, certainly. Our bottom line would be the amendment to the Meech Lake accord to include those things that I have just mentioned.

**Miss Roberts:** I would like to thank you for making such a positive presentation. You have given us good, substantive things to think about as to what might be helpful and how we can approach your particular concern with respect to Meech Lake.

One thing I would like to just bring to the fore again is the fact that you suggested not only that you be at the table or put on the agenda at the first ministers' conference but also that there be more active participation in the political process on the provincial level prior to going to that first ministers' conference. I think that is a positive way of viewing that; you are extremely well versed and very political and are aware that the more people you have behind you, the better.

I would like to just say to you that you are progressing in educating the rest of us Canadians about your particular place in Canada, which as far as I have been able to see right now is as a result of treaties made a long time ago, and as you have indicated, there is a trust situation between yourself and Ottawa. I want to encourage you to keep on with that education because I am one of those people who need to be educated.

I would also like to ask you if you can indicate to the committee what your greatest fear is as a result of the Meech Lake accord itself. Is it the fact that they have set out the agenda for the first ministers' conference? Is that the one that sets you back the most?

**Mr. Duxtator:** I think the biggest concern I have with Meech Lake is the fact that a distinct society has been recognized. We have been trying for years and years, and most predominantly in the last five years with the first ministers' conferences, to educate the first ministers of this land about our distinct nationhood within this country. The fact is that it seemed to have gone on behind closed doors,

away from the public or whatever, and in 19 hours they came up with the recognition of a distinct society. My own most personal fear of the Meech Lake accord is that we are not recognized by the first ministers in this land.

**Miss Roberts:** But you do not wish to be a distinct society, because you already are distinct nations within.

**Mr. Duxtator:** Right. We would like those people to recognize that.

**Mr. Offer:** In 1982, there was a commitment in the charter for participation in a constitutional conference. That took place in 1987. It was a failure. There was no agreement reached. I would imagine it is an understatement to say there was disappointment, despair and most likely some anger involved. When that happened, there was also no provision for any further meetings. I believe that is correct. When that conference ended without agreement in 1987, the obligation in the 1982 agreement had been met, I would imagine, and there was no further opportunity in the future for meeting, apart from what you would have to do, as you very well know would have to be done, in order to try to force a meeting.

The question I am asking is this: With the accord now and the constitutionalization of these first ministers' conferences—and I think in response to Dr. Allen's question, you said you thought these particular conferences would be an effective forum to bring forth your concerns—is the mere fact that we now have this Langevin agreement with the first ministers' conference again opening the door for further first ministers' conferences on aboriginal rights?

**Mr. Duxtator:** Is that your question?

**Mr. Offer:** Yes.

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**Mr. Duxtator:** I guess it is not opening the door for the discussion of aboriginal rights, but because of the agenda items that are included—one of the first meetings includes fishing as a topic, and as aboriginal people of this land we feel we have a distinct interest in that particular issue of fishing.

As I mentioned in the presentation, the Ontario Ministry of Natural Resources has a continual habit of arresting our commercial fishermen, and we do have a distinct interest in that particular issue. We feel that when fishing is a topic that the first ministers are going to discuss, we should be part of that or at least have representation at the table on behalf of the aboriginal peoples in Ontario and across Canada, because the fishing



issue is nationwide; British Columbia commercial fishermen are having problems, and people in the Atlantic provinces are having problems in fishing areas.

I think as far as the agenda items that come up because of the Meech Lake constitutional conferences are concerned, we would have a forum there if those first ministers would recognize us and give us the opportunity to be part of that.

As far as future meetings are concerned, as you have indicated, when the first ministers' conference in the spring of 1987 ended in failure, there was not a commitment for future meetings other than the Prime Minister's statement that there may be a meeting at some time in the future. He did make a statement to that effect, but there is no guarantee. The year 1990 has been mentioned. The year 1997 has a review of the Constitution at that point, and I think at that point there probably should be some aboriginal concerns.

We have been part of the discussion regarding the constitutional discussions in years past, so I think in the review of the Constitution in 1997, there will be an opportunity for aboriginal participation at that time as well. However, we do not want to wait that long. We need to clarify our positions with the first ministers at this time.

**Mr. Offer:** I think that is an extremely important point, that you do not want to wait that long, until 1997, as you have so clearly indicated.

I recognize the fact that it is not specifically put in as an agenda item with respect to the initial first ministers' conference, but I would like to comment that there are now going to be those first ministers' conferences, so I would think an argument could be made that there is the forum for this particular matter of such great importance to be put on an agenda, whereas there was no specific forum when the 1987 meeting was over.

I would just like to get your comments with respect to your view that the mere fact of section whatever it is in the Langevin agreement does possibly permit your particular matter to be brought on prior to 1997 and prior to some commitment or some statement made; it is now in the Constitution.

**Mr. Duxtator:** You said "possibly could include," and that is the problem we have. That is why we are saying if this committee could recommend an amendment to Meech Lake which would definitely put that in there so that we would have an opportunity to present—

**Mr. Chairman:** Mr. Morin, you will be the last speaker.

**Mr. Morin:** My preamble is going to be very short. We hear the expression "self-government" used very frequently. I hear all kinds of definitions. How would you describe self-government for the native peoples?

**Mr. Duxtator:** Self-government to me is a ways and means that we would have the opportunity to have the jurisdictional authority and control of our people on our lands. That is basically what we are looking for. Right now, the Indian Act, through the Department of Indian Affairs and Northern Development, keeps us on a leash type thing, holds us back and holds us down.

We are asking the federal government and the premiers to recognize the fact that we are an aboriginal people and we did have our forms of government years ago. We would like that opportunity now to have jurisdiction, as I say, over our people on our lands. To me, that is self-government of our people.

**Mr. Morin:** Does it mean that all the native people, all the nations, all the reserves, all the treaties would join together and form one nation? How would you—

**Mr. Duxtator:** I think we have to appreciate the fact that just within our own organization we have the Iroquois, the Ojibway, the Mississauga, the Pottawatomie. In some areas, depending on the geographic location, that could be a possibility, I suppose.

But I think you have to realize that there are different cultural backgrounds, even though we are basically lumped in as Indian native people in this land. We do have our own separate cultural areas that we come from. To respect that, we are saying that I, as an Oneida nation member, would like the opportunity to have jurisdiction over my Oneida nation people at home.

As far as pulling it all together as one group—

**Mr. Morin:** But still part of all the other provinces and everything, still part of a whole nation?

**Mr. Duxtator:** I am not clear on what you are saying.

**Mr. Morin:** What I am saying is that we hear all kinds of things, for instance, that the native people want to secede, want to go on their own and forget about the rest of Canada. I hope it is—

**Mr. Duxtator:** No, my interpretation is that once the first ministers of this land recognize the fact that we do have the right to self-government, to jurisdictional control over our people, we have to co-operate. You are in this land, we have been in this land, the federal government is here. As I

mentioned previously, financing and resources are the prime concern of any government.

As Indian government persons, we would want the opportunity to co-operate with the provincial government, with the federal government, with funding agencies, in order to ensure that we can do the best governing for our people at that time. So there has to be co-operation, I guess, to negotiate our fair share of the resources in this land, our land.

**Mr. Allen:** I know we are running a little bit behind time, but I think it is very important for the committee to get its head around on this question. As I understand the practical proposals that that would issue in, it would mean that you would progressively take on jurisdiction over, for example, the delivery of education, the delivery of children's welfare services, the delivery of pensions and seniors' programs and nursing homes.

Is that practically what you are speaking of, that over time, those would all come together under the jurisdiction of native peoples, perhaps in a contractual relationship initially with the provincial or the federal government, depending on the level of government concern?

**Mr. Duxtator:** As long as we had the opportunity to have the control of those areas, that is basically what we are saying, yes.

**Mr. Chairman:** Thank you very much, Mr. Duxtator, to you and your colleagues. I think particularly the points you have made in answer to these last few questions with respect to the issue of self-government have been very helpful. We thank you for coming this morning.

**Mr. Duxtator:** Thank you to the committee.

**Mr. Chairman:** I will ask the representatives for the Citizens for Public Justice to come forward to the table. Perhaps I might ask Mr. Olthuis, the legal adviser and research director, if he would introduce his colleagues or whoever is here.

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#### CITIZENS FOR PUBLIC JUSTICE

**Mr. Carrick:** I am Wayne Carrick, the secretary of the executive committee of Citizens for Public Justice, Ontario, the Ontario division of CPJ. On my immediate right is Gerald Vandezande, the public affairs director of CPJ, who will speak on behalf of the national level of CPJ and say a bit more about the organization. On my far right is John Olthuis, the research director of CPJ and a lawyer.

Since these two are staff of CPJ, I am here from the membership to say that this submission does have the backing of the 3,000 members and supporters of CPJ in Ontario and the 2,000 outside of Ontario. A description of CPJ is in appendix A of the written submission. In Ontario we are working for more just policies in several areas. We have been heavily involved in one of the advisory committees of the Social Assistance Review Committee. Also, we have been working with a number of native organizations in Ontario, as well as in Canada, in their struggle for recognition and self-government.

**Mr. Vandezande:** My name is Gerald Vandezande. The national organization of Citizens for Public Justice since 1963 has been essentially concerned with constitutional rights and the nature of pluralism. It has made a number of major submissions to the federal government, as well as the provincial governments, particularly as the rights of the native peoples are affected.

My colleague John Olthuis, who will be speaking later, has been involved particularly during the constitutional talks, as an adviser to the Dene nation and the Assembly of First Nations. We also made submissions with respect to pluralism and constitutional questions involving the Canadian Human Rights Code and have had a series of submissions to the federal Department of Justice, as well as to the Canadian Radio-television and Telecommunications Commission regarding broadcast policy.

For us the key issue is that, in a democratic society, we do justice to the diverse faith and value orientations of all Canadians and that Canadians, through their communities, institutions and organizations, be given appropriate opportunity, in law and in actual practice, to express these values and views. We elaborate further on that in our submission.

**Mr. Olthuis:** My name is John Olthuis and I am the research director of CPJ, as has been indicated. You have our brief before you. What I would like to do is summarize for maybe seven to 10 minutes, with the hope that for the rest of the time we can engage in a dialogue.

Basically, we have two recommendations to make. The first is that your committee recommend that the assembly refuse to ratify the accord, unless there are five significant amendments. Those amendments ought to deal with: first, inclusion of aboriginal nations as distinct societies in section 2; second, protection for social program standards from the possible negative effects of the opting-out clause; third, protection of all charter rights from possible legal



interpretations of the "distinct society" provisions; fourth, provisions to ensure greater pluralism and protection of minority rights, both in an individual and group sense, in our Constitution; fifth, removal of the veto power that all provinces and the federal government now have over key constitutional amendments, such as the creation of new provinces.

In the second place, we recommend that Ontario appoint a special independent commission, similar to the Social Assistance Review Committee, to gather and report to the assembly and to the people of Ontario and Canada on ways in which we can ensure—and we are talking legal and political ways we can ensure—a more diverse and pluralistic Ontario. There are many differences in our society, differences of language, religion, creed, socioeconomic world view and culture. We all need to work together to ensure that those differences build rather than retard the emergence of a pluralistic and dynamic society. We are recommending this morning that Ontario takes the lead in doing that by the appointment of a special commission.

I have some brief comments with respect to our first recommendation. We are asking you to recommend that the assembly not ratify this Meech Lake accord. We have two problems: One is with the process that led to its passage and the other is with a number of substantive problems in its provisions. It began as a good process: Let us get Quebec as a more active participant in the Constitution. It turned into a power play, in which each province grabbed for itself additional powers in return for granting special status to Quebec. Minorities, aboriginal people, charter rights, equality rights, all these things were jeopardized because of this power grab. We find this reprehensible in a democratic society.

We are also concerned about the Premier (Mr. Peterson) saying to your committee, "Look, go ahead and hold your hearings, but I am not going to make any changes." We are asking this morning that the Premier reconsider that and have an open mind about improving this accord. We salute the inclusion of Quebec as a distinct society, as most Canadians do, but this accord could have done much more. Many more things could have been added to it to provide justice for additional people. We are concerned about the excuses that have been given for not going into additional areas. We think that they are excuses and that what was lacking here is the political will to move ahead to extend rights to other people.

Let me deal with some of those excuses, such as the one about aboriginal rights. You have

heard about that. Mr. Doxtator was just discussing that with you, as did Chief Peters yesterday. There is absolutely no reason why aboriginal rights could not have been included in section 2. Aboriginal nations are founding peoples. Our first peoples should be recognized in that section along with the other founding nations.

We are told that could not be done because in the definition, Quebec's rights, for example, are already in section 93 of the Constitution and provincial rights and native rights are not. That may be true, but there are many clauses in the Constitution that require additional definition. The most fundamental of those is section 2 of the charter which, in a fundamental way, says that laws in this country are to be judged on the basis of whether they are fair and reasonable in a democratic society. The courts decide that.

The section on opting out on social programs has many words that are going to end up being interpreted by the court: "programs," "initiatives," "compatible with," and so on. The problem is not with the process. We are suggesting that aboriginal first-rights conferences be again put into the Constitution. We are suggesting that there be conferences. The problem is not the process. The problem is that the premiers and the Prime Minister come to these conferences not to implement the recognition of rights that there are in the Constitution; they come to narrow and take back what the Constitution has done. We are very concerned about that.

No matter what process you invent, unless the governments go to the table with the commitment to implement aboriginal rights, we are not going to get the extension of aboriginal rights in a true sense, namely, self-government for our first peoples in all of its context. We are recommending that that can and ought to be done. We suggest in our amendment section how it can be done.

With respect to charter rights, we are told—and the committee in Ottawa dealt with this extensively—"Look, the 'distinct society' clause does not give new powers; it is an interpretative clause." I think that is right because the fear, as you all know, is that it might be another section 93 of the Constitution under which the courts would say, "Look, this gives Quebec the right to discriminate, regardless of the clauses in the Constitution."

I agree that the "distinct society" clause is an interpretative clause, but if the courts reach the second phase of looking at whether a law is in accord with the charter and ask the question, "Is

it reasonable and demonstrably justified in a democratic society?" they are now going to be faced with the additional question—that is, in the case of Quebec in a free and democratic and distinct society, there is an additional question there.

The courts are going to have to take that into account, and it is possible in so doing they will say: "Look, the words 'distinct society' justify certain restrictions on charter rights that would not be justified if we just had the words 'in a free and democratic society' as apply in other situations." We are very concerned about that.

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When it comes to social programs, there is a reason, of course, why a number of the provinces fought so hard not to have the original wording included in Meech Lake. The original wording was that social programs, if a province opted out, had to "comply with national standards." That would ensure across the country equality of the standard of social programs to all citizens.

The present words are fraught with difficulty, "a program or initiative that is compatible with the national objectives." Those words are going to end up in the courts. Provinces not only want those words to design additional programs but also they want those words in order, possibly, to give substandard services in certain areas of the country. We are very concerned about that. We suggest amendments that we think are compatible. These things are all compatible with recognizing Quebec. Why not do them all at the same time as we recognize Quebec?

Finally, a few comments on our second recommendation, that is, the establishment of a commission to look at ways in which Ontario can move ahead to entrench for citizens not only in Ontario but also across the country a greater degree of pluralism. We applaud the accord for the contribution it has made to opening up the discussion on differences and for the fact that differences can be handled in creative ways. You can say Quebec is a distinct society and count that as something that will contribute to a dynamic society, not as something that will divide. We laud that.

The key question now, I think, is whether we will move towards a greater degree of pluralism for other minorities or whether other minorities will be treated as individuals with multicultural rights. In that connection, we are very concerned if, by multiculturalism, we are going to mean in Canada what is contained in Bill C-93, which was introduced in the federal Parliament, An Act

for the Preservation and Enhancement of Multiculturalism in Canada.

We are concerned with its contents because what it basically does is give some individuals cultural rights, the right to express themselves. It basically says to native peoples, for example, "We welcome and encourage your costumes and your head-dresses at the Olympics." Pluralism says, "And we accord to you the right that you have to self-government." That is the basic difference between multiculturalism and pluralism.

We want to fight for pluralism, not multiculturalism, which simply encourages ethnic contributions in the way of a special ethnic heritage. We want that but we want more. We want pluralism that truly accords to aboriginal people their basic rights, institutional rights and collective rights, and those rights for other minorities as well. We believe the way to start this in a constructive way is for a special commission to be appointed by the government of Ontario to go about Ontario asking people about how to deal with differences. We have a number of suggestions here.

First, we think the SARC model in some ways is a good model for a commission to go around and solicit views. We believe the committee should have: members from diverse groups across Ontario, as appointed by those groups, not appointed by the government; advisory councils like the SARC councils; adequate funding for participation of groups; informal hearings across Ontario; and that the committee should look at how other societies have dealt in a more positive way with differences so that differences can come to contribute to the growth of a dynamic society.

We are very concerned about this and we think Ontario could lead the way in saying: "Hey, towards the next steps in the constitutional process, if we are going to have new rounds, let the rounds be positive rounds to give additional rights. Let us not go off in the direction of a narrow multiculturalism. Let us continue to move in a direction of pluralism for more groups and societies."

Ontario does have a veto power, of course, on the accord. Every province does. We urge you to use that power to improve this accord. That is what we are saying. The accord can be approved in ways that do not jeopardize the significant recognition of Quebec, and if you do so, we think that history will judge the accord more favourably. It will say it not only recognized Quebec but did so in the context of also extending rights to



other people. Otherwise, we have the danger that it will be judged by saying, "It gave Quebec a distinct role; but in the process it eroded charter rights, it ignored and eroded the rights of aboriginal peoples, it contributed to reducing social standards" and so on. We do not want to see that and we respectfully urge your committee to make the kinds of bold recommendations that will enhance a significant step in Canadian democracy.

**Mr. Chairman:** Thank you very much for raising some issues, again, that we have not had put before us. I found particularly challenging your concept of pluralism in multiculturalism. I am sure we will want to explore that. We will begin with Miss Roberts.

**Miss Roberts:** Thank you very much, gentlemen. I do appreciate the comments you have made and your positive attitude towards what we can do to help the process, but I would like to ask you to define it just a bit more, if you could.

To me, there are two processes. One is the process that is set up with the first ministers' conferences, and that is going to go on from year to year. But I also have the feeling that if we are going to amend the Constitution, there should be a certain process that we go through as a nation, not just meetings of first ministers on a yearly basis. Maybe we can look at a process that leads us towards the amendment of the Constitution. Do you understand what I am saying?

**Mr. Olthuis:** Yes, indeed.

**Miss Roberts:** Each year they can get together and talk about whatever they want to talk about—the Senate and fisheries. OK? But they cannot amend the Constitution unless this process has taken place, whatever that process might be. What you are suggesting as part of that process is an independent commission here in Ontario. Can you suggest anything else that might help develop a process that made it mandatory that there be some national consensus on when we are going to amend the Constitution and on the steps to get to that amendment?

**Mr. Olthuis:** That is a difficult question, of course. To start with, we do firmly believe that the participation of people is crucial. In other words, it has to begin in each province with the government, and we are suggesting that in Ontario it be the commission, gathering opinions and formulating, probably in its own Legislative Assembly, a position.

**Miss Roberts:** OK. So your next step is to the Legislative Assembly.

**Mr. Olthuis:** I would think so. It seems very odd that in the most fundamental things in this country, the legislatures are not involved, either in terms of knowing what position provinces are going to present at the table or in having a report back after the first ministers' conference in any comprehensive way. We are talking here about very fundamental things.

The commission, we believe, is one route to that. We also think the present conferences ought to be opened up. For example, we have grave concern about what happened in the Ottawa proceedings, where Georges Erasmus, the president of the Assembly of First Nations, said: "You are having a conference on fisheries. This is the mainstay of native life. We should be represented." The committee's conclusion on that was, "Oh, well, native people will be represented there by their premiers and by the Prime Minister, like all Canadians." There is a preconceived notion there of how we are going to settle these things that we are very concerned about.

It is not just a process question. It is a question of the commitment of the provinces to go into those conferences actually to extend and pluralize rather than to hold on to their powers, and that process has to begin also at a very fundamental level with the people of Ontario and in the Legislature.

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**Miss Roberts:** The whole idea behind the process, though, I would assume, is not to stop the development and evolution of Canada as a confederation. Is that not correct? Twenty years ago if you had talked about pluralism—you know, your particular concept—no one would have listened to you. So the important thing about the Constitution is to allow it to be living. It is going to grow and, indeed, there is no particular way that the Meech Lake accord is going to stop that. Everyone agrees that this process is not the process that should be used to amend our Constitution.

**Mr. Olthuis:** We would say that a mature democracy should embrace pluralism. A mature democracy not only has room for difference but should cherish difference, and it should support the institutional expression of difference. Native people are one example. Native nations can contribute a great deal to our common understanding of how to live in the society. We should embrace that, not attempt to erode those rights and reduce them to individual rights. We think that applies to other minorities as well. We are a mature democracy now. We ought to move

towards pluralism, not multiculturalism in that reduced sense.

**Miss Roberts:** You think the Meech Lake accord stops you.

**Mr. Chairman:** Mr. Vandezande just wants to add a comment.

**Mr. Vandezande:** Just one comment: I think the experience we have had since 1982, and to take a specific cause, is that native people's rights were recognized for the first time in the Canadian Constitution. But over the last five years we have discovered that those rights do not mean all that much, because the provincial governments, together with the federal government, have allowed the process to be abused so as not to do justice to the very rights that were guaranteed in the Constitution. As we heard this morning, the process has come to an end. Unless the provinces—Ontario, for example—or the federal government take a creative initiative, there will be no further discussions with the native peoples, whose rights were included in the Constitution.

In my view, they should have had co-decisive powers as to how Meech Lake would deal with their rights, if their constitutional rights meant anything to begin with in 1982. But the very fact that their co-decisive powers—which were implicitly and, to a degree, explicitly recognized in the 1982 document—have now been ignored shows that there is no democratic process.

What needs to be done, in my view, is that when fundamental interpretations or rewrites of the Constitution occur, before the first ministers can even reach agreement on that, perhaps they can say, "We adopt this in principle: (a) subject to the proper examination by the Ontario and territorial assemblies; (b) subject, where necessary, when it affects the rights of the native people, to their consent; and (c) there might have to be a national referendum on some of these basic questions," because you deal with the life of the nation and the peoples of the nation.

For 12 people to get together and say, "We cannot afford to deal with their concerns at this point," is a travesty of justice and a violation of democracy. It goes against anything that the United Nations Charter talks about. We cannot be pretending to be piously subscribing to the Charter of the United Nations when it comes to South Africa and rightly condemning apartheid in South Africa, but practising it at home by not giving native people the right to participate in the entrenchment of their own rights.

**Mr. Allen:** I want to thank Citizens for Public Justice for a very substantial brief, which is at

once critical and constructive, and for a very articulate and incisive summary for us to work with.

I guess first of all I would again like to address the question of the commission. At first I thought perhaps this is another opportunity to discuss multiculturalism in the same old terms. We all know where that would go, and it would do us no good at all.

First of all, I guess I would like you perhaps to expand in a little bit more detail on what you mean. This is an interesting notion to me, that pluralism means something different from multiculturalism, that it really does entail the vesting of dignity and full proprietary roles, if you like, in groups in our community with respect to the important decisions that affect them. Therefore, you are talking not just about things that are folkloric; you are talking about economic entitlements of newly arrived Canadians, you are talking about participatory roles in the way in which multicultural and linguistic groups and varieties express themselves in the public education system and a whole host of items like that which are very tangible and solid and involving on an ongoing basis.

That is my first question, whether there is a bit more precision you can give us there. Perhaps I have hinted at some of the things it means precisely for me, or could mean for me.

Secondly, are you proposing this as something that would really extend what the premiers began to do when they included section 16 in the Meech Lake accord? They at least bowed slightly in the direction of statements that already existed in the Constitution with regard to multicultural rights as a way of saying: "Well, we really meant something more than just making a bow at that point. We are meeting in Ontario. It just has to take a tangible form of working towards some realization of something more that does not presently exist in that language." How does this relate to the section 16 stuff and what happened politically around that?

**Mr. Olthuis:** Section 16, I think, was an afterthought to the accord. Native people were not involved at all in the accord. Section 16 also refers to multiculturalism. At best, what it does is prevent the erosion of multicultural rights. It prevents perhaps the erosion of aboriginal rights, although that is not clear either, because those rights are now going to be interpreted within the context of the dual-society, linguistic duality clause. So it will have an impact, I think, on multicultural rights—a slight but negative impact—when we should be going in the other direction.



We do deal with the concept of pluralism in the brief at page 8. I will not go through that, but perhaps the simplest and shortest way of describing what we are talking about is by reference to the bill that was introduced in the House of Commons. I am quoting from clause 3(1)(e). This is the section that talks about what the policy of the government of Canada is, and that is, "To ensure that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity." We think it is key, and this is the key difference between multiculturalism, which is in this clause, and pluralism, which would say, "To ensure that all individuals and communities receive equal treatment." We are talking about collective as well as individual rights. We are talking about institutional expression of differences, not just cultural expression of differences.

**Mr. Morin:** On page 8 you mention, "Group actions such as setting up different school systems or creating distinct institutions to express and practise different economic, environmental and cultural beliefs should be allowed." Could you expand on that?

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**Mr. Olthuis:** Yes. We think that in a mature society we ought to recognize and encourage people with different values and concepts to express those in the fullest possible way. In other words, take the education system. We believe there ought to be freedom for a variety of people to set up education systems, provided they meet certain basic educational standards and so on, and those would all be public systems of education in the sense that different individuals would have the right to choose which public education system they would attend.

Native people would have the full right to say: "Look, we have a different world view, and that world view has to come to expression in the way we educate our children, so we want a particular kind of education for our children. It will meet government standards, but it will allow us to introduce our children to our own way of life in the way we want." We should not be afraid of that in a democratic society.

**Mr. Morin:** What about economic, environmental and cultural beliefs? What do you mean by that?

**Mr. Olthuis:** That is somewhat more difficult in terms of giving shape to that. When you have, for example, a community—and we have often had this in Canadian society, particularly with native people—where a traditional way of life is

very much tied in with spirituality and culture and so on, that is a belief that leads to a certain relationship to the land, certain traditional hunting, fishing, trapping and so on. That is a set of beliefs.

Our society says, "We need that land to cut the trees down to sell the lumber to the United States." There is a clash of cultural values here. Who says that trees as economic objects, rather than as spiritual or cultural gifts from the Creator, are more important? So we are saying we have to recognize that our beliefs in a capitalist society ought not to be so dominant that they do not allow for the expression of alternative beliefs such as those native people have. Why not say, "Indeed, your beliefs are very important, so we are not going to cut your trees down, because boy, this is a great stand of lumber"? We are going to say: "Yes, in your culture it is very important, and we understand that. That is your right in our society." That is the direction we are moving in, Mr. Morin.

**Mr. Morin:** And you mean that this would apply to all sects, for instance, who would want to form their own group, think the way they want, establish themselves in their own environment?

**Mr. Olthuis:** Not in the ghettoizing way that your comment suggests. We say there are those differences in our society. We all know about them, and they are healthy. My goodness, it is healthy. When you and I have differences, maybe, in our exchange, I listen to you, you listen to me. But let us accord each other in the society the right to say, "Yes, you have the right to develop your beliefs if they do not interfere with mine; I have the same right, and together we can build this different, dynamic society," instead of going in the direction of forcing a blandness or a sameness on our society in which creativity and distinctiveness are discouraged.

We say let us encourage it, let us embrace it, let us say this is good for our society and does not threaten the fabric of democracy, it enhances it, it puts more threads in the weave of society. That is what we are saying. It is not trying to create something artificial. It is saying that we have these differences in society. How can we creatively provide political and legal protections for them?

**Mr. Vandezande:** Just a couple of examples. Bill 30, which was passed by this Legislature, is a concrete example of doing justice to a particular faith and value community in respect to educational rights. We think that equal protection should be extended to the Jewish community and

should not be discriminated against. But in terms of economic and environmental rights, there are worker co-ops and housing co-ops in our province that think differently about how to run business enterprises and how to develop good neighbourhoods.

If anything, a government that is sensitive to these human values that people are putting forward and want to practise should encourage the emergence of those groups and, through tax incentives, grants and other ways, make it possible for such co-ops to make their particular contribution to the economic, social and cultural situation in Ontario. It could do that by cutting out the huge grants, subsidies and tax favours that are being given to the multinationals and by going out of its way to stimulate communal local participation in the economy on a nonprofit basis. That would be one example of doing justice to the plurality of values that people have with respect to the environment, the economy, business, education and you name it.

**Mr. Chairman:** We will go back to Mr. Allen. I am conscious of the time, so after Mr. Allen we will have Mr. Eves and Mr. Cordiano. At that point we will have to move on to our next group.

**Mr. Allen:** I will resist asking a question about some problems in values at the level of pluralism. Obviously, there has to be a hierarchy of values in some sense; otherwise, one ends up with the proponents from the Fraser Institute telling us that their values are equal to everybody else's, and the right to private profit can enter into conflict quite legitimately with community interest and more communitarian values. What I see your commission doing is wrestling with some of those fundamental things of hierarchy of value as well, which relates to the pluralistic process.

What I want to come back to is your comments about standards and objectives in shared-cost programs. I am a little puzzled about this whole discussion. There seems to be an implication that "standards" is better because it is a tighter word. It is more explicit with respect to what the federal government could mandate across the board for the provinces.

Let us suppose, however, that one has a federal government that does not want to mandate very much—I think one does not have to look very far to find one—and it lays down, as standards that have to be required of the provinces, terms that are very minimal and that cannot be exceeded in order to qualify for funding for social programs. Does one then want provinces to be bound by the limitations of

standards? I am coming at the question from the opposite end, obviously: not a government that will require maximum participation in well-thought-out public processes, nonprofit, etc., programming across the board, but one that would be very limited.

You have got provinces, on the other hand, that have limited resources but want to get in on programs that are progressive, want to expand them but have not got the money to afford them and are limited by the federal government's definition of "standards" and what it will fund in what they can do in a province. That is not an unhistorical observation, because we know that some of the more progressive programs that have evolved for Canada nationally have come from provincial initiatives.

Could you run your head across that one and see where you come out on it? It seems to me it is a possible scenario and it could tie us down on the standards side in much the same way that you do not want to be tied down on the objectives side.

**Mr. Olthuis:** The concern we have with "objectives" is, for example, that the national objective might be to relieve poverty. That would leave each province to say, "Well, indeed, we are relieving poverty." It is not too farfetched to say that a particular province might say: "We are relieving poverty by giving a huge grant to a private company with the hope that it will create jobs. That is our way of relieving poverty."

We think that is a real concern, particularly with the problems that the free trade agreement is going to put on the taxing of corporations. In other words, social programs are going to suffer because of less revenue. By national standards, we are talking about the level of assistance that Canadian citizens across the country are entitled to. We happen to think that ought to be a charter right, so to speak. Life, liberty and security of the person ought to say, "Look, each person who is unemployed or cannot work for a certain reason has a right to a certain level."

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So by "standards" we mean we would think that there ought to be an actual level that a province would have to meet in terms of its welfare payments before it would qualify for federal funding when it opts out of a shared-cost program. If that basic level is high enough, then provinces, of course, would be encouraged to go beyond it, but it would at least ensure a minimum standard of actual dollars delivered in programs across the country. That is what we would like to see ensured in the amendment.



**Mr. Vandezande:** The Canada assistance plan, which was adopted over 20 years ago, has as its goal the elimination of poverty. Everyone has agreed to it until this day, but it does not contain standards, for example, that all Canadians should be entitled to an adequate income that meets the poverty-line levels of Statistics Canada, so governments can continue to say our social assistance and programs are trying to meet that objective. If you incorporate in the Canada assistance plan that the social assistance programs must at least meet the poverty-line levels of Statistics Canada, you would have a standard to which we could hold Ontario accountable, which we will be doing this afternoon. Currently, they can just get away with saying, "Well, we are trying."

**Mr. Allen:** You would build on the kind of thing the Canada Health Act asks for—

**Mr. Vandezande:** Correct.

**Mr. Allen:**—where it is universal, accessible, etc. That was a very helpful answer. Thank you very much.

**Mr. Eves:** I will try to be as brief as possible, Mr. Chairman, and perhaps I will make just a few comments as much as asking a question.

I think your suggestions with respect to the process are rather innovative and interesting, and I am sure the committee will take those into account in its deliberations. You are asking for quite a few amendments to the accord and, being somewhat of a realist, quite frankly, although I may sympathize with many of them, I do not hold out much hope that you are going to achieve, in reality, everything that you desire.

However, I think there are a couple of areas where you at least have a chance of being successful. One is the entrenchment of all rights and freedoms under the charter. We have heard from many different groups, but they all seem to come down to the same thing, I think. That is that, because there is ambiguity laid out by certain sections of the charter—and which ones take precedence over others—I would think a fairly clear way to eliminate that ambiguity is to make a very simple, all-encompassing amendment which says that the rights and freedoms of all Canadians as established under the charter take precedence over the Meech Lake accord. Would you agree with that?

**Mr. Olthuis:** Yes. That is very close to the amendment we suggest, which is "nothing in section 2 abrogates or derogates from the rights and freedoms set out in the Canadian Charter of Rights and Freedoms."

**Mr. Eves:** Surely there is not one of the 11 first ministers who could disagree with that, seeing that they keep on telling us that was their intent all along.

**Mr. Olthuis:** Indeed.

**Mr. Eves:** I am sure there is not one of the 11 who would disagree with that. I do not know why that cannot be achieved in five minutes or less.

I think that perhaps the ultimate insult, though, under this document is the section that talks about future conferences and the agenda items that will be covered in the future, and I would think that the ultimate insult to the aboriginal people of this country is that such items as Senate reform and fisheries take precedence over their rights and their discussion on self-government.

**Mr. Olthuis:** I certainly agree with that, Mr. Eves.

**Mr. Chairman:** Gentlemen, thank you very much for coming before us this morning and presenting your brief. As I mentioned before, there are a number of very innovative ideas which I think are going to spark a lot of thought and reflection among the committee members, and we very much appreciate your taking the time to work out those thoughts and ideas and talk with us this morning. Thank you.

**Mr. Vandezande:** Thank you.

**Mr. Chairman:** I now call upon the representatives of the Metro Action Committee on Public Violence against Women and Children and ask Pat Marshall, the executive director, to come forward. We apologize for running a little bit behind, but I think you will appreciate that that happens at the end of the morning and the end of the afternoon.

#### METRO ACTION COMMITTEE ON PUBLIC VIOLENCE AGAINST WOMEN AND CHILDREN

**Ms. Marshall:** I certainly appreciate the opportunity to be here. Does that mean that we can continue?

**Mr. Chairman:** Oh, yes, we will go forward.

**Ms. Marshall:** Until—

**Mr. Chairman:** And you have—

**Ms. Marshall:** Five minutes?

**Mr. Chairman:** Yes, right.

**Ms. Marshall:** I can talk very quickly.

**Mr. Breough:** The guy is just doing his job.

**Mr. Chairman:** We will certainly have the time. We have received a copy of the submission, and if you would like to speak to that first of all, then we can follow up with questions.

**Ms. Marshall:** Yes, I would. I am here representing the Metro Action Committee on Public Violence against Women and Children, and we are an organization implemented by Metro Toronto council in 1984 to be a catalyst for the implementation of some fairly far-reaching recommendations dealing with violence.

As we are working to increase the understanding of the nature of violence in our society and its pervasiveness, to improve the response of society to sexual-assault survivors, to challenge the high tolerance of sexual violence that we have in our society and, of course, in the end, to reduce the actual levels of violence, we have some very grave concerns about the implications of the Meech Lake accord for the right of women and children to live lives free from violence and also to receive redress through the criminal justice system when this right is violated.

We are working with urban planners, with police, with medical and legal professionals, with educators, violence survivors, community organizations and three levels of government in a wide variety of policy and law reform initiatives, support service development and public education. A lot of work we do is with the police on the development of education programs to improve their response to sexual-assault survivors.

In our work we use section 15 of the charter in a very practical way, and that is the focus I want to bring to you today, because I think it is incredibly important in the deliberations you are now in the process of. That wording, "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination," is our measure, our yardstick that we hold up to our criminal justice system when we are assessing its response to sexual-assault survivors.

Sexual assault is probably the most underreported major crime in our country. The majority of women who do not report it cite as their major reason for nonreporting mistrust of the criminal justice system. They at once perceive that they will not receive equal benefit and protection of the law, and with one in four women in Canada, by conservative estimates, being subject to a sexual assault at some time in her life and that level of underreporting, we are talking about a large number of women not receiving, at the very first instance, the benefits that could be conferred by section 15.

Then for those who do report sexual assault and go through that criminal justice system, the benefits may still be very elusive. For somebody who has been through an assault and then goes

through the humiliating, painful process of reliving the trauma, telling that story—not in her words but in responses dictated by defence counsel's questions—to a roomful of strangers and then seeing an acquittal of her assaulter, you can imagine that the results are absolutely devastating.

In one case we are dealing with now, police testified that they found the woman in a fetal position, mumbling incoherently, but the court in that case did not understand that that is very indicative of a sexual assault. Rather, taken with all the trappings of the middle-class standing of the accused, that accused was acquitted and the devastation for that woman continues.

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I bring to you a particular concern because it looks like those acquittals may increase. In Ontario we have been very concerned about the overextension of resources of our crown attorneys and the inability, often, to match the preparation time that would allow an equal benefit of the law in the trial process. When our Attorney General (Mr. Scott) told members of our organization within the past two weeks that at this point it would probably be only a 15-minute pre-trial interview a crown attorney could have with a sexual-assault victim, our concerns increased. That is not enough time to gather and prepare adequately for a trial. Therefore, access to justice at that very fundamental level seems to be being withdrawn as we speak. Sexual-assault cases certainly take more preparation than that.

Then, as we move into a system, even when an assaulter is found guilty and there is clear evidence that that crime took place, we have no guarantee that the judge understands the nature of the crime or its impact on the victim. In fact, in the research we have been undertaking in our organization, we see a wide discrepancy between judicial understanding of sexual assault and women's own experience of the assault.

There is an inherent violence in sexual violation that is just not being understood in the way it is with other violent crimes. Only in a minority of sexual assaults is there actual physical coercion or the use of a weapon. That is necessary only in cases where an assailant must overpower a victim. In the majority of cases, through either position of authority, size or threatening language, the assailant already has power over the victim and does not need those other things. Yet in case after case, as I have submitted to you, there is this focus on the absence of this other violence which militates against sentence.



So a judge can say, after a stepdaughter has been raped three times over a two-month period, that there was no violence; in another case, with forced sexual intercourse 12 or 13 times against a 14-year-old daughter, that there is no allegation he used physical force or violence; in another case, forced sexual intercourse and indecently assaulting a daughter 500 times and attempted forced sexual intercourse against a niece, that there is no physical coercion. That level of misunderstanding is of considerable concern for us.

Sometimes we note that the tolerance of sexual violence takes another form. Judges use euphemisms. A sexual assault is called a misstep. Another one involving young daughters is called an exaggerated paramedical examination by the father. In another one, sexual abuse of young farm hands, six of them, the judge said, "This man was caught up in the spirit of boyish horseplay." Those euphemisms and then the resulting sentence, which often correlates with the level of excusing—such comments as "to err is human" about a social worker sexually abusing—are just not acceptable in our society.

In another area that we are very concerned about, judges profoundly underestimate the impact of sexual assault. Although studies and our own experience with survivors tell us that women are profoundly affected by sexual assault—in one study, more than one in five women who were raped attempted suicide and more than twice that number seriously considered it—we have judges saying again and again: "There is no lasting and permanent damage to the complainant. The injuries were minimal." Even if she passed out in the course of the rape: "There is no threat or use of force. The victim was not hurt in any way, has not suffered any lasting damage." Sexually assaulted a stepdaughter for an eight-year period: "There is no evidence of lasting impact on the children," etc. Those kinds of comments show that people in those cases are not receiving equal benefit of the law.

In other cases, we have a judge's concern for the accused overshadowing any of his expressions of outrage or concern for deterrence, so disproportionate weight is given to mitigating factors: employment, the accused's grade 12 report card, monetary loss, marital problems, sexual dysfunction, good citizenry. Law school is named as rehabilitation in one case for a very long history of sexual abuse. There is this focus of concern that somehow this assault was out of character, when no research supports that conclusion that middle-class assaulters are very

different from other assaulters. Men who rape are found in all social, educational and professional categories, and our work on sexual abuse of women by health professionals certainly emphasizes this fact.

As we set the promise of the charter against the reality I have just described to you, I hope it makes quite clear how vulnerable and how fragile are women's rights to justice at the hands of the law. Achieving equal treatment now guaranteed under section 15 of the charter will not be an easy matter.

Mary Eberts has described some of the onerous tests that are in place. There is a tradition, for example, of resistance to judicial education, which would be the obvious remedy for the kinds of misunderstandings that I have described to you today.

Composition of the bench in Ontario: I am sure you have seen some of those figures and statistics. Even more recently, the criteria for judicial appointments that have been put forward by the Canadian Bar Association reflect little sense of being influenced yet by sections 15 and 28 of the charter. The criteria are generosity, patience, sympathy, charity, good work, high moral character, experience in the law, intellectual and judgemental ability and good health—period, full stop. No criteria there about any demonstrated understanding of equality issues.

That is with the charter as it is now. With the strongest charter in place, we still are having difficulty achieving equality. I certainly do not believe that one needs a legal opinion to understand the impact of clause 16 of the Meech Lake accord. It says: "Nothing in section 2 of the Constitution Act, 1867, affects sections 25 or 27 of the Canadian Charter of Rights and Freedoms."

That language seems so clear that even my 16-year-old daughter, when she read it, was fairly clear about what it meant. The aboriginal and multicultural rights are not affected by the new linguistic duality and "distinct society" provisions. I might add and comment, as our last speakers have, that multicultural rights, we hear again and again, without clear protections from discrimination, may be very hollow as they are described there.

If clause 16 had been omitted, there may still have been a controversy over the effect of the accord on the charter, but by singling out those two provisions for special protection, we have now a hierarchy of rights and freedoms, some rights seen more clearly now, more equal than others, and we cannot afford that.

We have been told by the federal politicians: "Trust us. It is OK. The rest of the charter is not affected," or "The rest of the charter is affected, but it will not be a problem for you." With respect, that is when we find those legal opinions helpful, which tells us that politicians' words have no weight in legal interpretation.

They have also reminded us that the equality provisions have not been interpreted by the Supreme Court of Canada and now, therefore, we must look forward to an interpretation heavily weighted by the wording of the accord, and that is our great concern.

In large part, I do not have to remind you, it was equality-seeking groups that gave this government of Ontario its mandate. Many of the initiatives have been welcomed, but this accord is causing us great concern. We have such a distressing but clear window on the inequality of Canadians and the difficult challenges that equality-seekers face across the nation. We have learned to appreciate, therefore, the potential and the value of the charter and see the Meech Lake accord putting those rights and freedoms at risk.

Premier Peterson's sense of an accessible government has been evidenced in many ways, but in signing this accord, which will have such impact, he was party to a process that could not have been less accessible to us as Canadians.

**1210**

In listening to Premier Vander Zalm's rather chilling response to the recent Supreme Court of Canada decision, I really felt that was being made in the spirit of the Meech Lake accord. That is the kind of thing we will now be able to expect; and it is just not good enough. We have in this province such a proud tradition of national leadership and of making decisions that will benefit all Canadians. At this point, just focusing on the issues that I am now, equality-seekers across the nation need our help, and of course there are so many others you have been hearing about.

In order to achieve the one goal, the Meech Lake accord has jeopardized so much for so many. We can and must balance the rights of Quebec with those of violence survivors, the disabled, the elderly, the visible minorities and the women of Canada. The accord must be amended to protect all the provisions of the charter or, at the very least, the equality provisions of the charter.

Of course, this process must be improved, as we all shudder, I think, at the prospect of annual constitutional grab-bag meetings and having to deal with the fallout of those. The process by

which we arrive at constitutional reform must also be looked at. The implications of what you are doing are far-reaching, and I do not envy you your challenge. I welcome the fact that you have the opportunity to have this input. We are very concerned about the recent statements of Premier Peterson in support of an unamended accord. I hope that with some very strong recommendations, you will be able to convince him that this is not in the interests of the people of Ontario.

I wish you well in your deliberations and would be happy to answer any questions.

**Mr. Chairman:** Thank you very much for setting out very clearly the views of your organization and for providing examples in a very difficult area to reflect the concerns you have with the accord.

**Mr. Breaugh:** I want to put a couple of basic questions to you. We are struggling with the notion of how we can best establish, as clearly as we can, that the charter remains supreme and that rights which were gained so short a time ago are not taken away by this accord. We are struggling with how to do that. We have had several people suggest that a reference may establish that.

Frankly, the problem I have with almost anything other than a Supreme Court decision on the matter is that it does leave you vulnerable, in that the first ministers will meet again and again. This year, they have decided that equality rights are important, so they should be reinforced, but next year that will not be so important.

I think the case is emphasized by your submission this morning, where you kind of do your case-by-case submission of the current attitudes. Through a recent experience of my own, I am sadly aware that when one talks to the Law Society of Upper Canada and the benchers, maybe they are not quite perfect. They certainly do not take kindly to such comments, and it is not an easy task. They believe very firmly that they are fair and honourable, and I believe they are trying. We are not talking about intentions here; we are talking about current practices and how to change those. The charter is a very valuable tool.

For example, in many communities, the type of program you run would not be looked on as being the favourite thing to do on a Tuesday evening. Maybe something else is a little more socially acceptable. You are often challenging the local legal establishment as to how it carries on the business of running the court system. If you do not have something substantive like a Charter of Rights to back you up, they are all going to say: "That never happens here. We don't



have that kind of problem. There's nobody like that in our community."

I am concerned, frankly, that we find the mechanism that establishes in the most powerful way that the Charter of Rights, which we just received and are just beginning to use, is not diminished by this Meech Lake accord. I would appreciate your comments on what has been proposed to us by a number of eminent constitutional experts now, that the way to do that is to try to put together a reference to the Supreme Court and to get a Supreme Court decision on the matter.

**Ms. Marshall:** A reference is certainly something we have discussed, and at many levels it is very appealing. I think there are many risks involved with a reference in terms of the time line, in terms of the wording of the question, in terms of what it says, but I think it is something that I would like to see discussed more fully. We have certainly looked at that and have talked a lot about that.

Ideally, of course, if one provincial government is very clear that this accord at this point, without amendment, is not acceptable, then we can delay in that way. I guess that is the option we would ask you to look at first: Can this province do that?

We are just intervening in a Supreme Court of Canada decision—actually, it is one of the first ones on section 15—in two weeks. The thought of an intervention with the 10 attorneys general coming in as interveners—just the process—is a little mind-boggling just in terms of what that is going to look like.

**Mr. Breaugh:** At least they would have to do it in public this time.

**Ms. Marshall:** Yes, they would, and that would be a welcome change.

I guess in this deliberation, there will be stages at which other decisions are made, and I think maybe this is a little early for that one. Even whether you can have an open vote in the Legislature, it is my understanding, has not been agreed upon. If that option is closed off, then I think the reference looks much more likely.

**Mr. Breaugh:** Let me put to you just quickly a second concern that I have. If someone is able to convince me that we can find a technique that establishes the validity of the charter, and it is unchallenged by Meech Lake and all of that, much of what others have criticized in this accord diminishes.

For example, I am not really concerned about what any of the provincial governments would do in the way of establishing equivalent programs or

things like that—there is a lot of advantage in that—if I am assured that nobody has lost any of his equality provisions.

On the other hand, to give you the reverse of that, if we are unsure that we have maintained what we already have in the Charter of Rights and we float off to the provincial level all the provision of services that might come with that, it does not take me long to get to the position to see where, if Premier Vander Zalm or Premier Devine takes a different attitude towards a program like yours, someone in one of those provinces will want to argue, "Whether you like it or not, I have a right under the law in Canada to establish such kinds of programs, to deal in these areas, which nobody else in my community thinks is popular." It may not be as popular in many parts of Canada to set up a program such as yours as it is in downtown Toronto, and that is a fact of life that I recognize.

If I get the one thing, which is to establish that there is no impact of a significant nature on the Charter of Rights by Meech Lake, I am prepared to let some of these other things ride, because it may happen in an awkward way; people will have to kind of dig in their heels and insist on their rights for funding. If you do not get the assurance that the charter is supreme or relatively unaffected by that, then I would be more concerned than I am right now with things that other people have brought out about programs such as yours, about the attitudes of courts, about sentences that are given and things like that. I would like to get your response on that.

**Ms. Marshall:** I think we are very concerned about the vague wording about the cost-shared programs, the word "compatible" without some clear definition. I think the clear definition can be added, though. I do not think that is an insurmountable problem; it could be clarified with some very clear criteria. But I would agree with you that if the charter is not supreme as the measure, the stick, that we are holding up to all these processes and initiatives and responses to our equality-seeking groups, then we are in trouble, and in more trouble.

1220

**Mr. Offer:** From your last comment, it is very clear that the basic issue is how and whether section 15 is affected in any way, shape or form by the Langevin agreement. I am sure you have heard, and I want to get your comment with respect to what we have heard from some other eminent constitutional experts, that section 15 and section 28 are what might be referred to as rights-giving sections, whereas section 2 of the

agreement and section 25 and section 27 are interpretative sections and, as such, will be used only as an aid by the particular court at whatever level in interpreting particular questions. I would like to get your comment in dealing with the distinction between what we have heard are sections dealing with rights, which section 15 clearly is, and other sections which are merely interpretative, such as sections 2, 25 and 27.

**Ms. Marshall:** I have heard quite a bit of dispute about what you are now talking about, and I am sure you have too, that the process that has been used to date, I think, the section 1 process of determining what is a reasonable limitation, would be looking at the charter as a whole. Certainly, in the cases we have seen before, I do not feel much consolation from that kind of suggestion. There is nothing in place that I know of that shows that is how the court will process the charter as it is making the constitutional decisions.

I think we are in an area such that, because that process has not been gone through yet at the Supreme Court of Canada level around the interpretation of section 15—for example, we do not even know what the steps are going to be in those deliberations. I just do not feel very assured by that kind of interpretation and I know that others are not either.

**Mr. Offer:** Your response brings out—and I think Dr. Allen yesterday touched upon it, just as you have—the fact that in dealing with matters brought to the court's attention, or whatever, you are not going to look at one particular section, you are going to look at a number of sections. You are going to keep in mind all of the sections.

I think that is right and I think that is what you have just indicated, but I think it is also a fair comment to say that, with respect to those sections, there is a clear difference in the wording in dealing with sections that are rights and sections that are matters of interpretation. I understand what you are saying, "Well, we just are not absolutely certain;" but we have been given representation to show that section 15 is clearly a rights-giving section and section 2 of the agreement, for instance, is clearly an interpretative section.

I just say that as comment. If you wish to respond to that—

**Ms. Marshall:** There is a whole history in 1981-82 that I think shows it is just not as clear as that in terms of the process of developing the charter. I believe there are two versions of what happened around the table in terms of the inclusion of clause 16: (1) that it was for the

reasons that you have suggested; and (2) that we got to aboriginal and multicultural and we did not ever remember equality-seeking groups. I guess there is still nothing that fills—

**Mr. Breagh:** This is the kind of scenario that makes you feel good.

**Ms. Marshall:** Well, look at the composition of who is around the table. We do not have a strong commitment to equality that comes through on an absolutely consistent basis yet in this country. I tried to give you some examples of how we are living our lives. I think that second scenario is equally possible and must be considered. That was a very rushed process. You know the pressures that were involved in terms of the locked door and those men who were there. They were not going to be allowed out. It is not a very comforting process.

**Mr. Sterling:** I am intrigued by the arguments that are going on here and the pretence that politicians are, in fact, in favour of section 15, particularly in this Legislative Assembly, because when Bill 30 came up for debate in this Legislature there was one member, and you are looking at him, who took the position that section 15 should outstrip every other section in the Constitution of Canada.

I do not know why groups come here without drawing the conclusion that our Premier, who strongly supported the discriminatory aspect of Bill 30, as was stated clearly in the Supreme Court of Canada that it was a discrimination that was sanctioned by this Legislative Assembly, why groups come here and expect that these politicians are going to take equality of all people across Ontario and Canada over special interest groups that may or may not exist now or may be created in the Constitution, as it appears there may be, particularly with regard to the "distinct society" section.

I get angry when I hear the arguments flow forward in terms of everybody talking about section 15, particularly in this Legislative Assembly, when nobody wanted to put that argument forward when we were talking about Bill 30 and discriminating in favour of one religious group to the detriment of all others. The Supreme Court said, in retrospect, after we discriminated here of our own free will, that we had that right to discriminate.

As I hear more and more groups come forward, I come more and more to the conclusion that there should be a straightforward section within the Constitution that section 15 is the priority. When you are dealing with justice issues



and when you are dealing with making choices in law and in society, you have to prioritize.

**Ms. Marshall:** We did try in 1982 when section 28 was given special status. There was certainly a request that section 15 be included at that time.

**Mr. Sterling:** Do you think it is realistic to even think that our Premier or the other premiers and the Prime Minister are going to overlook individual interests, be they provincial, religious, or one or the other? Do you think that any of them will come to the conclusion that the equality section has to be paramount? Do you think it is realistic in terms of our history of Ontario with regard to Bill 30?

**Ms. Marshall:** Yes. Bill 30 is one part of our history in Ontario, but there have been a number of other equality-based initiatives that I think give me some optimism that there is some room for movement, change and recognition that that is necessary. I come to you with some level of optimism in spite of the kind of work I am doing, because we are seeing changes. But we are also right now under the most incredible threat, certainly that I can remember, in terms of the impact of this unamended accord. There is nothing else that has happened in the history of my work over the decade that I can remember ever feeling this level of fear and terror about.

**Mr. Chairman:** Miss Roberts has a short supplementary.

**Miss Roberts:** One of the reasons you have the fear and the terror is because of the lack of judicial interpretation of section 15, and there is a matter of timing that we are looking at; not necessarily the accord itself but a matter of timing.

**Mr. Elliot:** Could I have a short supplementary, Mr. Chairman?

**Mr. Chairman:** A short, short supplementary.

**Mr. Elliot:** I would like to thank you very much for your frankness and the optimism you bring with your presentation to a very serious matter, which we have to address somehow in our society.

What I would like to do, because you are a Metro action committee, is to ask you just briefly, if you will, to give us some idea of how a Metro committee like this could to best advan-

tage keep the Ontario Legislature apprised of its concerns on a continuous basis, because I think the kinds of things we are beginning to talk about here are long-haul kinds of things with respect to the fulfilment of your wishes. I think we all aspire to do that, but how would you best be able to keep us advised of your concerns on a continuous basis?

**Ms. Marshall:** As I said, we met with the Attorney General two weeks ago to respond to the report of the Ontario Courts Inquiry by the Honourable Thomas Zuber. We are meeting soon with the Minister of Labour (Mr. Sorbara). We have a fairly strong consultative network with the province, certainly a considerable amount of it through the justice section of the Ontario women's directorate, and work co-operatively with the province to achieve, I hope, some mutual goals.

Beyond that, we try to respond to as many public education initiatives as we possibly can and do a lot of work just with the media in terms of the understanding of these issues and the interpretation of these issues. I would certainly welcome other suggestions from you if you have them.

**Mr. Elliot:** Do you think that up until now you have been listened to as you have expressed your concern?

**Ms. Marshall:** We have been very careful because we have come into this situation with very minimal power. What we have is knowledge and carefully documented research. I think we have maintained, to the best of our ability, a level of credibility. That has seemed to bring a considerably high level of consultation by the three levels of government with us.

**Mr. Chairman:** Thank you very much again for coming this morning and for your most thoughtful presentation. We appreciate it.

**Ms. Marshall:** Thank you so much. Good luck.

**Mr. Chairman:** Just one short note to the committee members. There will be four, not five, presentations this afternoon. Leslie Smith will be at 3:30, not at four. We are recessed until two o'clock.

The committee recessed at 12:33 p.m.

## AFTERNOON SITTING

The committee resumed at 2:09 p.m. in room 151.

**Mr. Chairman:** I call the afternoon session to order and invite Deborah Gillis to come to the stand. We welcome you this afternoon. Perhaps I will simply turn the microphone over to you. We have received a copy of your paper. If you would like to proceed and present your views, then we will have an opportunity to ask some questions.

## DEBORAH GILLIS

**Ms. Gillis:** Thank you, Mr. Chairman. I am very happy to have the opportunity to present my views to you. I hope you will find them useful.

The argument I am going to pursue concerning the political significance of the Meech Lake accord rests on the premise that the document ushers in a new era of federal-provincial relations which can be seen to alter the balance of federalism in favour of a quasi-intrastate union. The 1980s have been historically significant for the proliferation of constitutional changes the decade has seen. All of these changes have been the result of ongoing federal-provincial conflict.

It has been generally accepted that the Canadian Charter of Rights and Freedoms was promoted by the federal government not only as a means of ensuring the protection of fundamental human rights in Canada but also to bring about national unity. This historic document was not signed by the province of Quebec upon its adoption in 1982, thereby diminishing much of its potential for national integration. Thus, the concern for bringing Quebec into the constitutional fold emerges, creating the political impetus that allowed for success at Meech Lake.

The document has been criticized in many quarters for its diffusion of power from the centre to the peripheries. The cry has been, "Who will speak for Canada?" alleging that the primary effect of the 1987 constitutional amendment will be to decrease the power of the central government, creating a country which is the ultimate community of communities. My paper will illustrate that the provisions outlined at Meech Lake will act to strengthen the federal government in relation to the provinces by allowing Canada to move towards a climate characterized by increased interprovincial harmony.

The background to my paper sets out what I call the structural constraints that the original constitutional document placed on national unity in this country. For time's sake, I am going to

summarize what I have in the background to the paper. I have argued that when the Fathers of Confederation came together in 1867, they united two conflicting principles when they wrote the Constitution, those being federalism and parliamentary government.

It has been argued that the most fundamental aspect of a federal country is the degree to which the interests of regional governments are represented in the central government. That is the underlying principle of federalism. On the other hand, parliamentary government came to us from the British model, which operated under a unitary system where there was no need to take regional interests into account. What we see when we look at the provisions of the Constitution outlined in 1867 is that those elements which relate to parliamentary government acted to diffuse the ability of the government to allow for regional representation within the central government.

There are two different forms that a federal country can take. One is intrastate federalism and the other is interstate federalism, which I refer to on the fourth page of my brief.

Intrastate federalism is characterized by the accommodation of regional interests within the institutions of central government. The emphasis here is that there is a potential for conflict in the overlapping of governmental jurisdiction and that this conflict can be avoided not just by separating the powers of the two levels of government but also by allowing for the representation of those interests within the institutions of central government. On the other hand, interstate federalism rests on the premise that jurisdictional control of the federal and provincial governments can be sufficiently separated as to avoid conflict.

What we see in the Constitution Act, 1867, is that elements of interstate federalism were clearly put into place with sections 91 and 92 of the Constitution, but the elements of intrastate federalism were not as clearly put into effect. Here lie the reasons for the problems suffered by the Senate which has lacked legitimacy because it is a body appointed by the federal government. Each of the provinces was not given equal representation in the Senate.

Other problems are the party system and how it operates in the House. Members of the cabinet and individual members of Parliament, although they are representatives of the provinces, are not



able to bring the views of their regions to the government because they have to follow the party line, which is necessary to keep the parliamentary system running. The problem is there has been an inability to achieve regional representation within the central government.

When we turn to the 1987 constitutional accord, we see that in the period preceding the Quebec referendum, members of the federal cabinet appealed to the people of Quebec to vote against sovereignty-association, promising that they would bring about constitutional renewal which would alter the balance of federal-provincial relations. The response in Quebec was a resounding yes to Canada, but when that constitutional reform came about it came not in renewed federal-provincial relations but in the Charter of Rights and Freedoms and a domestic amending formula.

It had been accepted that the charter would act to bring about national integration, but what this assumption failed to recognize was that national disunity was not just a result of a lack of effective symbolism in Canada but of the tensions created by the constant conflict between the federal and provincial governments.

When the first ministers met at Meech Lake in March 1987, they met to discuss the conditions under which Quebec would agree to join the constitutional fold. Thus, although the participants at Meech Lake were there primarily to discuss the demands of Quebec, the first ministers must be applauded for their tenacity in forging a deal which is favourable to all Canadians.

My argument is that the constitutional reform was, and continues to be, necessary in Canada to overcome the obstacles placed on national unity by the dynamics of interstate federalism. My support for the Constitution amendment of 1987 rests on the premise that it alters the balance of federal-provincial relations in Canada in favour of a system that can be called quasi-intrastate.

An examination of the objectives and provisions of the Meech Lake accord lends evidence to this hypothesis. What one finds is a movement away from classical interstate federalism to a system of increased intergovernmental consultation in areas which have traditionally been the sole responsibility of the federal government. In the preamble to the 1987 constitutional accord, we see the commitment of the governments of this country to create a Canada which is characterized by "the principle of the equality of the provinces, which would provide new arrangements to foster greater harmony and co-

operation between the government of Canada and the provinces."

The Honourable Lowell Murray, in a presentation before the special joint committee of the Senate and the House of Commons on the constitutional accord, reaffirmed these sentiments when he outlined three objectives which would be achieved through the accord. Senator Murray maintained that these objectives were: "recognition of Canada's diversity and linguistic duality; respect for the principle of equality of the provinces; and promotion of co-operation and collaboration among governments."

Elsewhere, he states: "The accord confirms the principle of the equality of the provinces. The accord strengthens the legitimacy of national institutions by giving all provinces a role in the appointments to key national institutions, and it puts in place intergovernmental mechanisms and ground rules to co-ordinate economic policies and pursue constitutional renewal. This is what the accord has achieved—a creative, dynamic process that will place a premium on seeking consensus."

In my estimation, these statements are crucial to an understanding of the Meech Lake accord. The onus for national unity is on intergovernmental negotiation, resulting in this movement to a quasi-intrastate federalism. I qualify the use of the term "intrastate" because Meech Lake does not create regional representation in all institutions of government, and where it does so it will take a number of years for the effects to be felt in the political system. Yet what has been achieved is a movement in this direction, which is perhaps best illustrated by the provision for future constitutional discussion on Senate reform.

It is this overall tone of the agreement which sets the climate for reduced regional conflict. Central to this movement towards intrastate federalism is the equality of the provinces, thus establishing what I would call the twin pillars of the constitutional accord of 1987. These pillars are reflected in a trend towards intrastate federalism based on equal accommodation of each of the provinces.

Following from this line of reasoning, I must express my discomfort with clause 2(1)(b) of the Meech Lake accord, which affirms "the recognition that Quebec constitutes within Canada a distinct society." This is coupled with an equal uneasiness with section 3, which affirms the corresponding "role of the Legislature and government of Quebec to preserve and promote the distinct society of Quebec."

I see this provision as being contrary to the goals and objectives of the Meech Lake accord, as already documented. These sections clearly give Quebec a special place in the Canadian Constitution which is not afforded to the rest of the provinces. In the words of the special joint committee on the 1987 constitutional accord: "These principles"—that is duality and distinct society—"are more than merely preamble. They must in future be taken into account by the courts, along with the other rules of interpretation, in arriving at a balanced understanding of the whole of our Constitution, including the charter."

From this, the claim that the "distinct society" clause will have no meaning, nor give any special power to Quebec must be discredited. The more likely scenario is that Quebec will be given an additional outlet by which to override the charter, by establishing that specific legislation can be "justified in a free and democratic society" as a means of promoting Quebec's distinctiveness.

#### 1420

Here I have placed emphasis on the promotion of this distinctiveness of the province, because this right has not been given to any other province, nor to the government of Canada. Although Canada is declared to be a union of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside of Quebec but also present in Quebec, this fundamental characteristic of Canadian life is only to be preserved, not promoted, as is the case in Quebec.

On another level, one can argue that the "distinct society" clause does little to create a united Canada in which French-speaking Canadians can be made to feel at home throughout the country. Instead, what has been created is a situation where the distinctiveness of Quebec is enshrined in the Constitution. This distinctiveness is not clearly defined in that we do not know if it applies only to the French majority of the province or if it includes the English-speaking minority.

In addition, by creating this distinctiveness around territorial boundaries, the linguistic and cultural distinctiveness of French-speaking people outside of Quebec is not equally assured. Thus, the greatest problem of the clause is definitional. As Ramsay Cook argues, prior to Meech Lake the meaning of "distinct society" was to be found in the conditions outlined by the Quebec government for its acceptance of the Constitution Act, 1982. Yet after Meech Lake,

the "distinct society" clause has been set adrift from these provisions, leaving it open to the courts for definition. We are once again left in the position of having the place of French-speaking Canadians in our society left to judicial interpretation.

For many years in our country we have placed emphasis on the bilingual fact of Canadian life. By establishing this fact in the Constitution as a "fundamental characteristic" of Canada we ensure the acceptance of French Canadians throughout this country. I do not believe that anyone could argue that this is not a good thing for national unity. The "distinct society" clause acts only to ensure the promotion of the distinctiveness of the citizens in Quebec, leaving out the interests of the rest of the French-speaking community, although the nature of this right to be interpreted by the courts for the sole protection of one of Canada's provinces, subtracts from the long-fought-for equality of the French-speaking population of this country, and ultimately for the goal of national unity.

The focus of my paper is on the fact that greater provincial participation in the institutions of the central government will foster greater interprovincial co-operation, which will ultimately lead to a stronger, united Canada. The opposing perception, as I pointed out in my introductory comments, is that decentralization of power will further fragment the country, creating the ultimate community of communities in Canada.

In response to this challenge, I urge those who call themselves federalists to keep several points in mind. The first is, as I have argued in this paper, that the unequal fusion of parliamentary government and federalism has provided the framework for territorial conflict. The way to alleviate such conflict is to allow for regional representation in the institutions of the central government, providing therefore a counterbalance to the majoritarian bias of the House of Commons.

Second, it is useful to look at the US example, as it provides the model for classical federalism. Here we see a country which has experienced much less territorial conflict in that regional issues have not dominated the political agenda to the degree to which they have done so in Canada. Two contributing factors are worth noting. One is that the United States has a much different constitutional tradition than we have here in Canada. The values expressed in the document beginning "We, the people" differ significantly from those found in the "similar in principle to



the United Kingdom" version found here in Canada.

It is accepted that the charter will go a long way towards rectifying these differences and thereby creating the impetus for a new political climate. Yet the second factor that must be kept in mind is that the American system has allowed for the representation of regional interests within the institutions of the national government.

It is argued that in the United States "effective territorial representation within national political institutions has promoted national integration, strengthened the national government and reduced the power of the state governments."

The argument for a corresponding respect for regional interest within the federal government in Canada follows from the US example. This is not to say that a congressional system would be appropriate for Canada, but that the interaction between the two levels of government within that country illustrates the degree to which territorial conflict can be avoided by a movement to intrastate federalism.

Despite claims to the contrary, such accommodation of regional interests can in fact add to the power of the national government. In this era of growing provincial importance and increased overlap of jurisdictional control, the interests of the federal government can only be facilitated by a reduction of regional conflict. As Donald Smiley argued as far back as 1971, "the price of the survival of Canadian federalism may be the radical restructuring of the central government to make it more representative of territorial-based diversities."

It is on the basis of these arguments that I place my support behind the Meech Lake accord and urge the members of this committee to call for its ratification by Ontario. I have shown in my paper that there is an inherent need for reform of the Constitution Act, 1867, if Canada is to survive as a united nation. This need for reform centres not only on the position of Quebec in Canadian society, but on the need for regional representation in the institutions of the central government.

The Meech Lake accord, by giving each of the provinces a role in areas which have traditionally been under the sole control of the federal government, goes a long way to rectifying many of the structural problems of 1867. It is only the "distinct society" clause which violates this principle of provincial equality, and an examination of its meaning and potential effects would be a useful exercise, not only for the members of this committee but for all Canadians who are concerned with the future of this country. The

constitutional accord, 1987, is not the final version of an effectively reformed Constitution, but it does point Canada in the direction of national reconciliation.

**Mr. Chairman:** Thank you very much. You have obviously done a lot of work, which is evident as well in looking at the background section, historically putting in perspective a lot of your comments. You have particularly focused on the question of regionalism, which I do not think we have talked about a great deal up to this point.

**Mr. Eves:** I think you are to be congratulated for a very thoughtful and well-produced paper. I gather from your paper that you are obviously in support of the accord, certainly in principle you are. I would ask you to expound upon, or perhaps clarify for committee benefit, your concern with respect to the "distinct society" clause. Do you think this is something that is enough of a concern—obviously not that you would ask the committee to withhold its support of the accord. How would you propose that the committee go about examining the meaning and potential effects of that clause? For example, it has been suggested to the committee by Professor Baines, I believe, among others, that perhaps a court reference with respect to that clause and others might be a useful exercise. Could you comment on that, please?

**Ms. Gillis:** Sure. I would agree with that position, that a reference to the Supreme Court might be useful, because there have been so many points raised that no one knows exactly what the clause means and how it is going to be interpreted in relation to the charter and the rest of the Constitution. By putting a reference to the court, we would at least have, prior to the adoption of the agreement, a clear understanding of how it will be interpreted, should it come before the court at a later date.

My problem with it rests on the belief, as I have argued, that the agreement clearly establishes the fact that its objective is to create the equality of all of the provinces. Because we do not know exactly the effect of "distinct society"—and it may be used by the government of Quebec to gain special powers in relation to the charter in particular—I see that as violating this principle of equality of the provinces. That is where my trouble with the clause lies.

**Mr. Eves:** Professor Baines's concern, and that of other groups that have appeared before the committee so far, is the same, only she was much more specific in that her primary concern was the effect that clause and others may have with

respect to, for example, equality of women. Perhaps Quebec would be empowered, if you read that "distinct society" clause in a certain way, to permit that province to enact legislation that may derogate or take away from women's rights under the Charter of Rights and Freedoms.

**1430**

**Ms. Gillis:** As I pointed out in my paper, the government of Quebec has been given the power to promote its distinctiveness, which neither the federal government nor the rest of the provinces have been given. How I see it is that Quebec might be able to use that promotion of its distinctiveness in relation to section 1 of the charter, arguing that specific legislation can override certain sections of the charter, as you said perhaps the equality section, because it is necessary or justified in a free and democratic society to promote the distinctiveness of the province. That is the concern; being clear on how it is going to be interpreted by the courts.

**Mr. Breaugh:** You have done what the Prime Minister and 10 other cohorts failed to do. Stick around; there may be a job opening in Ottawa later on this year. You have provided us with a rather clear analytical discussion of why the accord is a reasonable way to proceed and you have identified and verified the legitimacy of that process. I am attracted to much of what you have to say.

There are two or three things I would like to get your response to. One, a number of groups have been before us and made very legitimate arguments that the process overwhelms anything that might be the end result. The Northwest Territories and the Yukon were before us and others will arrive to represent the same case from a slightly different perspective. It is pretty hard to deny that two recognized governments in Canada were not only forgotten about and ignored but when they banged on the door and said, "Let us in because you are talking about us too," the 11 people who made this agreement said no. They are going to challenge that before the Supreme Court.

It seems to me they have pretty reasonable grounds for saying: "You cannot decide who is and who is not a legitimate player at the table on your own. You are deciding the future of a nation. We are legitimate governments. You have recognized that, and you cannot legitimately exclude us when you do this kind of an accord." It seems to me that poses a major problem.

The other difficulty and the other thing I would like you to respond to is that all of what you have

argued in this paper are things that basically I would agree with. I have no problem with that at all. I think it is our obligation to respond to groups that have identified specific matters that are of great concern to them, but I do not argue with your conclusion.

My problem is, suppose we had done this process at the end of this long committee process, and two years from now 11 people, or 13, met in Ottawa and said: "We represent all of the legitimate, recognized forms of government past the municipal level in Canada. We have thought about all of the concerns, we have taken amendments from all over, we have listened to proposals, we have taken this through our local legislatures, and here we are in Ottawa at the end of the process. We have clearly been delegated by our provincial governments to represent them on constitutional matters, and this is the agreement we came to. Now we would like you to ratify it." That is a process that is open and democratic. I understand it. It respects our existing institutions. At that point in time absolutely no one in the country, in my view, would have a legitimate claim to cry foul.

The problem is, nobody told anybody that 11 people were going to go to Meech Lake to a cottage, that they would stay there overnight and out of that would come a new Constitution for Canada. Then they would meet a little while later at an office building in Ottawa and finalize the deal. Then they would all go back across the country and say, "Here is the deal, and no one in the nation is allowed to amend it." That process stinks. That is one that flies in the face of the democratic process in any part of the free world that I am aware of.

You tell me how you would analyse and defend that process, because I am concerned that—and I put this question to a number of groups who have come in here—the way this deal was done overshadows its merits to many people, and may, in the long run destroy it. I would be interested in your response to that.

**Ms. Gillis:** I think the defence of how the accord was brought about rests in the fact that the Prime Minister and the 10 premiers would say that it is a democratic process in the sense that they have been delegated the authority by the citizens of their province to represent the interests of their province, that this is their role, to come together and discuss these issues.

I certainly agree with you that it was a closed process and the fact that no amendments are allowed seems to detract from its significance. I cannot really justify the process itself, but that is



how I would argue it. They would assume it was democratic in the sense that they have been elected by the people to represent their interests.

**Mr. Breaugh:** Ok; let me just pursue one other quick question. This is all being made legitimate now by the creation of a new term. There are variations on it, but I guess the most commonly used one is "executive federalism." I know of no such term in the history of Canada. I do not know that we have ever used it before, but now, out of necessity, it seems to be born. Again, I do not deny for a moment that these were premiers and the Prime Minister, but we have never done it this way before.

I think the fact that the ratification process requires each of the legislatures to adopt it is a clear indication that they, too, know they have no such power. If they had that kind of power, if the history of Canada and our existing Constitution and our political traditions said, "Those 11 people have a legal, moral and political right to sit in a cottage and decide this," I would accept that. But no such precedent exists that I am aware of, and I think they acknowledge that by the simple fact that this agreement must be voted upon by each of the legislatures, the federal Parliament and the Senate. The fact that no amendments are allowed is a new political rule. I do not know of any other rule that has ever been put on anybody's parliament in Canada that says: "Here is a bill. It cannot be amended." Quite the contrary.

Give us your rationale on how you would handle that.

**Ms. Gillis:** I think it is a difficult question to address for the reasons that you have stated. It is almost a redundant process. At this point, there is really nothing that can be done about it. What we can do, I guess, is learn from the exercise of Meech Lake for the future and perhaps move to a system where amendments to the Constitution follow in the nature that you outlined earlier, where there are meetings such as this and public hearings and input from the people whose views are represented to the Premier prior to his representing the interests of the people in a meeting of executive federal leaders. I think that is what we can learn from Meech Lake at this point. Trying to defend what they did is very difficult. As I said, it is almost redundant. There is nothing we can do about it now.

I am certainly troubled by it as you are, but now we have to look to the future and how we can rectify that situation in future constitutional amendments.

**Mr. Breaugh:** It is a good thing you did not apply for that job. I think you would beat Mulroney hands down.

**Mr. Elliot:** I, too, would like to begin by complimenting you for an excellent presentation. The people who have been witnesses here who are optimistic like yourself with respect to the future of Canada always appeal to me a lot more than the ones who are not and would like to reject things. I would like to highlight the final comment on page 16 of your handout that you gave us. "The constitutional accord, 1987, is not the final version of an effectively reformed Constitution, but it does point Canada in the direction of national reconciliation."

We began this whole process by listening at length to a number of very astute and learned people with respect to constitutional amendments, processes and that type of thing. This week we have been listening to people who are finding fault for very valid reasons in their own minds with various aspects of the accord—both the process and the detail of the accord I might add.

#### 1440

You say we now have to look to the future. What I would like you to comment on further, if you would, are your impressions, because you have already obviously done a great deal of work with respect to considering this accord and constitutional amendment and the process that should be followed. Within the accord, assuming it is accepted by everybody, we are guaranteed that there will be first ministers' conferences on a regular basis and that type of thing. Can you expand upon the type of thing that, in your mind, might be desirable to make those first ministers' conferences more worth while?

**Ms. Gillis:** When I say the accord is pointing us in the direction of national reconciliation and there is still a need for reform, that follows from my belief that the accord is moving us in the direction of intrastate federalism. As I said, the provisions put into the accord are not the final ones. We do not have an intrastate federalism constitution now because of Meech Lake but it is pointing us in that direction, which is going to help, in my opinion, to alleviate some of the regional tensions by allowing the provinces to be represented in the central government. Canada's history has been dominated by conflict between the provinces and the central government; so I believe that by allowing the provinces to have a role within central government some of this conflict will be avoided.

To look to the future, we see the commitment, as you said, for first ministers' conferences on the Constitution. Specifically, Senate reform has been pointed out. The reform of the Senate is perhaps one of the greatest areas where the government can move towards intrastate federalism by allowing the provinces to have an effective voice in Ottawa. I think that will be another step towards this process of national reconciliation.

**Mr. Allen:** Why would one assume that a Senate composed of provincial representatives would somehow represent a balancing act to the federal government, when it might well simply be a wrangle between various provincial and sectional interests in the country? That is the first question.

Second, would not one of the offshoots of executive federalism be to highlight once more the disparity of powers among different provincial regimes and between the provinces on the one hand and the federal government on the other?

I am thinking of reactions from some spokesmen from various of the smaller provinces, who have said, "Our capacity to field resources for those battles on an ongoing basis, as well as all the interministerial conferences that take place across the country already, is so much smaller than those, for example, of Ontario, Quebec and the federal government that we simply will be cut to pieces in the process."

Is there not a possibility that entrenched executive federalism will open up new regional conflict?

**Ms. Gillis:** Certainly I think there is that potential, but we also have to keep in mind that each of the provinces has been given an equal voice in this movement. One would assume, hopefully, that the opinion of or the weight given to the interests of each of those provinces is equally important, although, as you say, smaller provinces will suffer from not having the resources to present their views as clearly as the larger provinces, such as Quebec and Ontario, and the federal government itself.

The point is that those provinces have the opportunity to present their views and they carry as much weight as those of the rest of the provinces. In that sense, it is a balancing of the majoritarian bias of the larger provinces, in that the interests of the smaller provinces count just as much as do the interests of the larger provinces, which are more populous. That, I hope, would be the case in a Senate that was reformed, with equal representation for each of the provinces, in that

the smaller provinces would be given a voice equal to that of those provinces that are larger in both resources and population.

**Mr. Allen:** You do not sense a problem in the multiplication of provincial participation in each of these new segments of renewed federalism in Canada that would significantly tilt the balance quite dramatically in the opposite direction and we would end up with a very decentralized federation?

We have gone through this oscillation in our history. We started off with a very centralized concept and within 20 years it was being reinterpreted in a very decentralized concept and by the time of the crisis of the Depression moving back the other way at a time when we needed more centralized powers.

There seems to be some flexibility there, but the more you get this built into the tight construction of provincial participation here and there, it becomes more and more difficult to accommodate those swings of adjustment, if you like, of flexibility in practice. You end up with something that is irremediably decentralized, irremediably provincialized, with all the problems that creates for national unity.

**Ms. Gillis:** I agree with you that there is a movement towards decentralization and that the Constitution has swung from a centralized state to a decentralized state, but that has occurred partly because of the nature of the Constitution itself, which gave certain powers to the provinces, which naturally led to the provinces becoming more important and requiring more resources and power.

I see allowing the provinces to have a voice in the central institutions of government as a strengthening point for the federal government, in that if it acts to reduce regional conflict, then you are not going to have the constant interplay of province against central government all the time. In that sense, the citizen's loyalty will not be divided—for instance, I am an Ontarian before I am a Canadian.

Do you understand the point I am trying to make? By alleviating the regional conflict, citizens are not torn between their province and the central government all the time, and I see that as being a strengthening force.

**Mr. Allen:** Now they can be against other provinces and the federal government.

**Ms. Gillis:** One would hope not.

**Mr. Allen:** I would hope not too.

**Mr. Chairman:** I want to thank you, on behalf of the committee, for coming today.



Perhaps I can just mention, because I know some of the members have been interested, that yesterday we had one of your classmates, Gayle Barnett, here. I am not sure what the course is, but I commend members of the class for coming forward to the committee. We have had two very interesting papers.

I think it was mentioned by Mr. Breaugh yesterday that when a private citizen takes the time and effort to put the kind of work that you obviously have into your presentation, we know these are views which you really want to express and bring before us. We thank you very much for doing that. Good luck with your report.

**Ms. Gillis:** Thank you.

**Mr. Breaugh:** We will all be recruiting from that class like mad now.

**Mr. Morin:** Apply for a job now.

**Mr. Chairman:** I now call upon the representatives of the Voice of Women, Kay Macpherson, Madeleine Gilchrist and Betsy Carr. We thank you very much for joining us this afternoon. We have had a lack of water at that end, so we wanted to make sure there was at least something there as well.

I am not sure who is going to serve as spokesperson. We have a copy of the presentation you are going to make, so if I can just turn the floor over to you, please proceed as you wish. At the end, we will follow it up with questions.

#### VOICE OF WOMEN

**Ms. Macpherson:** I am not going to be the spokesperson; we are going to do it as a trio. My name is Kay Macpherson and I have with me Betsy Carr and Madeleine Gilchrist, all members of our Voice of Women administrative committee. In addition to that, we have other fingers in the pie, so to speak. Betsy is with the Canadian Federation of University Women. Madeleine Gilchrist is with the Réseau des femmes du Sud de l'Ontario and also has been vice-president of the advisory committee to the board of education on French language.

We are all past members of the executive of the National Action Committee on the Status of Women. This is what is known, I think, as a network. It spreads.

**1450**

In addition to our Voice of Women connections, we do speak for a number of women with whom we have constantly been in touch over the years.

I must apologize because I am not sure if I am able to read well enough to read my section. We

have divided it, and if I am stumbling too much I will hand it over to my colleagues. First, we start with Betsy Carr.

**Ms. Carr:** Thank you for this opportunity to add the voices of Voice of Women to the growing chorus that calls for change in the Meech Lake constitutional deal. A Toronto Sunday Star editorial on the amendment on February 7 called it flawed, the title being A Time to Listen. The Peterson government is listening through this committee to concerns and recommendations for changes and we are optimistic that these pleas will effect change.

I just want to add that our presentation is quite short; it is five pages. I overheard that the previous one was 16 pages. We have purposely kept it to the things we thought were most important, but as the previous presenter continued, I was wishing that I had a few more things in mine because I would like to indulge in dialogue with her. I could not agree with a lot of her things, but anyway we will proceed with ours.

**Mr. Chairman:** There is an opportunity during questions to get into some of those other areas.

**Ms. Macpherson:** A little bit about our history: Voice of Women/La Voix des Femmes was founded in 1960 as a national organization with branches in every province, including Quebec. VOW works for international co-operation and disarmament, responsible environmental policy, for equality and human rights. As a nongovernmental organization, an NGO, we are represented at the United Nations and work with many other peace and women's groups across Canada and abroad.

We are a founding member of the National Action Committee on the Status of Women and have consulted with and lobbied government for over 25 years. Our members worked to establish the equality clause in the Charter of Rights and Freedoms during the 1980 and 1981 sessions. Earlier still, our French- and English-speaking members played important parts in the actions leading to the establishment of the Royal Commission on Bilingualism and Biculturalism. We are therefore convinced of the importance of the concept of Quebec as a distinct society, and in no way do we wish to jeopardize Quebec's acceptance of the Meech Lake accord. I will skip the next sentence because it is a repeat stated later on.

Voice of Women's major concerns are as follows—and as Ms. Carr has said, we have many others but we will reserve them for later: the process, the equality rights and opting out.

I am going to ask Madeleine Gilchrist to read the section which follows because I think you will be getting bored by listening to me stumble.

**Ms. Gilchrist:** You might get used to my accent, too.

The process: Canadians believe that they elect their representatives and participate in a democratic process which encourages responsibility among citizens for their own government and its policies and decisions. This democratic process requires that citizens be well-informed and able to make reasonable judgement for the common good, and for this they require information and the consideration of their ideas and suggestions.

The process by which the Meech Lake accord was developed and made public runs counter to this whole democratic principle. At both federal and provincial levels, Canadians were presented with a fait accompli, given minimal time and facilities for gathering information, assessing the meaning and implications of the accord, discouraged from questioning or opposing any of the many confusing or potentially hazardous sections and, as far as women were concerned, excluded from the accord and told not to worry their little heads about it, all would be well.

The democratic process went by the board and half the population was politely insulted.

Canada is not a corporation whose managers have a free rein in deciding what is best for the business and themselves. Our Constitution is Canada's most important document, affecting us all, and citizens have a right to be listened to when it is being developed. Eleven men and their bureaucratic draftsmen cannot do an adequate job alone.

We are told that Mr. Peterson has said he will consider no amendments. If this is so, what are we doing here today? Wasting time, energy and money for an exercise in futility? We hope not. Since the date for a decision is two years away, we suggest a cooling-off period for study and discussion so that at least in this province the democratic process may be seen to be working and the citizens are treated like intelligent human beings, complementing the work of the politicians and bureaucrats.

I will pass to Betsy on the equality rights.

**Ms. Carr:** Most important to women is clarification of the present status of equality rights, which the charter established in sections 15 and 28, a triumph in 1981 after extraordinary efforts by thousands of women across Canada. The Liberal government in Ottawa had listened.

Section 15 guarantees the right to equal protection and equal benefit of the law without

discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Of these, the sex base affects over half the population.

Section 28—I hope you do not mind my repeating these; it is just for review purposes, because we are going to discuss them.

**Mr. Chairman:** Please do.

**Ms. Carr:** "Notwithstanding anything in this charter, the rights and freedoms referred to are guaranteed equally to male and female persons."

Women's expectations in 1988 are just the same, no less. But section 16 of the 1987 amendment reaffirms the guarantees for multicultural and aboriginal peoples and official language minorities, conspicuously omitting women's equality. The social contract between men and women in the charter is ignored. Our information is that the 11 men who were first ministers had no intention of jeopardizing women's rights in this way. They were working to a deadline of a few hours, and probably without competent advice.

Some legislation has not yet been updated to comply with the charter, even though three years were given for this, making the legal situation for the court process unclear, where claims to equality are seldom, if ever, unopposed. The omission from the Meech Lake amendment adds confusion. When different groups are treated differently, something is given to some and not to others. We are offended and confused that the wording does not clearly state what is meant, and women dare not risk unknown court decisions or the promise of future correction, given the rocky history of women's rights in Canada.

I would just like to add at that point that the reference to the Supreme Court is included here. I think it could be quite difficult because of the present very fuzzy situation where we just do not know where we stand. This is on good legal advice that we understand this, so I think it would be a risky thing to do at this point.

The solution we advocate and recommend you take to the Peterson government of Ontario is charter primacy. This is the recommendation: Voice of Women recommends deletion of section 16 of the constitutional amendment, 1987, replaced by a provision that the Charter of Rights prevail over the amendment. It is our firm conviction no other remedy will suffice. It is broke; fix it.

I will pass now to Ms. Gilchrist

1500

**Mme Gilchrist:** Vous avez la version en anglais. Je vais continuer en français sur la



dualité linguistique de l'article 1 de l'accord en tant que caractéristique fondamentale du Canada. Je suis une francophone, comme on dit, hors Québec, et depuis 1981, les groupes de recherche de l'égalité, nous avons un but en commun et nous n'avons cessé d'y travailler ensemble. Maintenant, ce que l'accord fait, c'est qu'il nous sépare, car dans ce document, qui traite les groupes différemment les uns des autres, «égalité» peut signifier différentes versions.

Je considère ce principe comme absolument très offensif quand on pense qu'en 1981, et bien avant aussi, on travaillait ensemble. Maintenant, on nous traite différemment en établissant une hiérarchie des droits. Ce n'est pas la direction que nous avons choisie, mais c'est en tout cas une raison de plus pour amender l'accord du lac Meech.

**Ms. Macpherson:** The Voice of Women is convinced all Canadians are entitled to equal levels of services and opportunities no matter which province they live in. Section 106A exacerbates regional differences. It permits provinces to opt out of new point federal-provincial programs, raising many questions. Words used are ambiguous, e.g. "national objectives"—who defines them—"initiatives" and "compatible"—in whose opinion? Who makes the assessment? Canadians in different provinces will not receive equal treatment.

One alternative is to delete section 106A from the accord. The new provincial veto power on constitutional amendments is a dangerous restraint on the repair of present omissions or unclear passages and on future proposals on provincial status.

Altogether, federal powers are diminished and balkanization of our country ensues. Who speaks for Canada and our national distinctiveness?

**Ms. Gilchrist:** To summarize our presentation, we would like to urge this committee to consider the following points.

The accord, the Meech Lake process, has brought lack of confidence, lack of information and a lot of confusion, forcing people into questionable choices and putting women's equality of rights at risk.

Therefore, we recommend that a cooling-off period be set and that consultation between government officials of the province of Ontario and representatives of the equality-seeking groups be established, so that communications can be facilitated freely with the public, keeping in mind the Premier's (Mr. Peterson) comments and promise that we should have a more open government. So far, it reflects badly on his

credibility and political future. Also, we recommend that provisions should be made for funding the equality-seeking groups so that they can meet and consult on a regular basis similar to the 11 premiers.

The last, but most important, recommendation is to amend the accord to give primacy to the Charter of Rights.

**Mr. Chairman:** Thank you very much. You mentioned at the beginning that your presentation would be short, which it was in some respects, but you have been very clear and specific, and for that we thank you.

I wonder if I could just ask one question, just so we understand clearly the organization of the Voice of Women. You are a national organization. One of the questions that has arisen at times is to what extent the concerns a number of women are expressing as individuals and within organizations, are shared by women within Quebec.

I assume that within your organization, as la Voix des femmes you have francophones, obviously, but also women from within Quebec. In terms of the various points of view that have perhaps been expressed within your own organization, how would you characterize the reaction of various women's groups in Quebec? Are there differences of opinion there? How should we sort of approach that one aspect, because it is one question that has arisen?

**Ms. Macpherson:** With the lack of information and the length of time it takes to communicate, it is difficult for us to get a clear picture. Although I suspect the majority of our members would certainly support the "distinct society" provision, we have had no opportunity since the summer to meet with them for any extensive time to sort out any difficulties or differences, so I cannot really give you a clear answer. It is partly because of the fact that the information coming and going between us was unclear, for them and for us. It is something that time will sort out, if we have time to make quite clear to them how we feel and they have time to make clear to us how they feel, dividing them by language at the moment. I am sorry I cannot give a clearer answer.

**Ms. Gilchrist:** May I just add that we are all in the same boat. Let us face it. In terms of equal rights, it can be Quebec, it can be British Columbia or whatever. It does not matter which language we speak; we are oppressed, we are deprived of our rights and Meech Lake is just a mess for women. We are back to square one,

where we were before 1981. We all share the same comments.

**Mr. Eves:** Quite frankly, I think you have enunciated two very important recommendations to the committee. Your first one is with respect to a cooling-off period. We have heard a lot over the two-plus weeks we have been sitting with respect to process. Many members of the committee have enunciated that perhaps we should be looking to a way to provide a better process in the future. I have often subscribed to the theory that there is no better time to start on the future than right now.

With all due respect to some members of the committee, this government had a very ample opportunity—in fact, the Premier was questioned in the House in late April—to provide for open public hearings between late April and the first draft of the Meech Lake accord, and the first part of June when the final draft was agreed upon. He quite flatly refused to do so. In fact, I think the only legislature in Canada that did so was that of Quebec. The National Assembly there was the only one that actually had public hearings and public input before the final draft was agreed to by its government.

Although it may take some swallowing of political pride by the Premier, he is now being given a second opportunity, through recommendations such as yours, to adopt this cooling-off period and to actually listen to what the public is saying. Even if it means backtracking politically, I think he would be well advised to adopt that advice and listen to what the people are saying. Hopefully, he will.

The second point you make—and I wholeheartedly agree, and others who have appeared before the committee have agreed as well—is that there has to be some clarification of this ambiguity as to whether the Charter of Rights—and I mean all the rights enunciated in the Charter of Rights and Freedoms—has primacy over the accord. We hear constitutional experts and lawyers on one side saying, “Of course, it does.” My obvious reaction to that is if that is what everybody means, why do we not say so and enunciate it in very clear language?

That is exactly the amendment that Professor Baines was talking about when she said that perhaps all the rights protected by the Charter of Rights and Freedoms should be enunciated very clearly to have primacy over the accord. I take it you would be in favour of her proposed amendment.

**Mr. Chairman:** Just for the record, I saw heads nodding, but so it is recorded would

somebody like to just indicate what the nods meant?

1510

**Ms. Gilchrist:** You do not like body language.

**Mr. Chairman:** In either of our official languages, but perhaps someone would just—

**Ms. Carr:** That was one of our recommendations, and we still feel that way at the end.

**Mr. Allen:** I am quite pleased personally, and I know my colleague is as well, to have the Voice of Women here making a representation to us and to hear you speaking both with one voice and two voices. That is very nice.

The committee appears to be coming to my point of view—I will not put too many words in everybody’s mouth—but it appears to be very much seized of the problem that you have brought before us with regard to process. I think more and more of us, and more and more members of the Legislature, are really concerned that this thing is being done backwards.

One of the nice things about doing it forwards, and I would like your response to this, about having done it the other way around, would have been that it would have brought a lot of the rest of us up to speed as far as constitutional debate goes. While it has been said—and you may have alluded to it; certainly my colleague did in a previous question and others have in other papers—that Meech Lake is unprecedented as a constitution-forming device, in actual fact it has been the practice we have adopted in this country from the very beginning.

Constitution making has been very much an executive exercise. Constitutional conferences have gone on in this country for some length of time as executive enterprises and most of the rest of us have not, if you like, been clued in to the language, been familiarized with the Constitution or got used to the terms and conditions of debate so that we can really meet the whole thing head on. That is one of the chief problems I have with the process. It is not just that in actual fact it cuts us out, but it leaves us totally out of the educative process that is necessary to engage in the debate in the first place.

In that respect, I wonder if you have that same feeling, that you have not just been disfranchised in one sense, but doubly disfranchised by this process.

**Ms. Macpherson:** You sound like a woman talking.

**Ms. Carr:** I think the three of us who happen to be here today all took part in the struggles back



in 1980-81, so we felt we were kind of picking up where we left off. We thought we had settled this matter, and here we are again. From our point of view, it was not as difficult. We were certainly involved then, but for the general public and for people who were not closely involved at that time, who did not have their interests threatened, as women's interests were at that time and as they are again, I think you have made a very good point. Public discussion on this or on the defence white paper or on the trade deal, public discussion on all of these things is very important in our society. We should have opportunities to make our positions known and we thank this committee for doing so on this subject.

**Mr. Offer:** Thank you very much for your submission. You have raised and touched upon some very important points. What I would like to do is direct your attention to the bottom of page 1, where you indicate that your members worked to establish the equality clauses in the Charter of Rights and Freedoms during 1980 and 1981. On page 3, under the equality rights, you talk about the efforts that were made in 1981.

As you are probably aware, we have been from day one grappling not only with the change to the Constitution but also with the process of how change has occurred. I was wondering if you might share with us your involvement in that process in 1980-81 so that we might be able to come to grips with the issue as it is being addressed to us in 1987-88.

**Ms. Gilchrist:** Do you want us to give a summary? It involved a lot of phoning, a lot of legwork, and it mushroomed. Fortunately, we had the big help of women lawyers on our side, and Kay Macpherson herself was involved. It started in a café in downtown Toronto—as simple as that.

**Ms. Macpherson:** I think that is the main thing. We started with the grass roots, and I am talking specifically of the action which eventually ended in section 28 and the equality clauses being put in. It was a network of women which developed almost spontaneously with help from women in the media, women of all parties in Parliament, the backup staff of the MPs and so on who helped us; and it started, as Madeleine said, in a café where we got together with a small group to talk about it.

It also had its beginnings because of the cancellation of the opportunity that women were supposed to have to talk about the Constitution, the cancellation of the conference that was called by the Canadian Advisory Council on the Status of Women, which was the spark, I think, that got

everybody going. From that it built up, and that is where we got the long and tedious tasks going of sorting out what women wanted.

**Mr. Offer:** After that sorting out and after those many, many meetings, you took your concerns where?

**Ms. Carr:** We had a huge conference in Ottawa with 1,300 women, all set up in three weeks. We came together and made conclusions and recommendations at that point, and then they were presented to government.

**Ms. Macpherson:** They were lobbied.

**Ms. Carr:** They were lobbied. We worked hard.

**Ms. Macpherson:** Both the federal and the provincial first ministers got followed around all over the place. They had meetings with women. It was sheer badgering by the people concerned which got their attention and made it clear that women were really determined to have some changes made. Otherwise, I do not think it would have happened.

The press probably caught the excitement of the actual fact that 1,300 women had got themselves to that conference, with no financial help whatever from any government or any other source, were given the space in the House of Commons by, I think, a conglomerate effort of the women MPs of the time; followed by the mayor of Ottawa, who was also a woman, giving us the building there for the second day's conference. It was a collaborative effort, which I think sparked the public's imagination and then eventually got the attention of elected representatives and the people who were making the decisions.

It was a long process. It went on well after that conference, right into the next spring.

**Mr. Offer:** I believe it is important the committee know something of the process you went through in 1980-81 when we are dealing with concerns raised again in respect to the process in 1987-88. I think it is important to know what you have done in the past so that we might be directed in a better vein in the future.

**Ms. Macpherson:** I should refer to the Ad Hoc Committee of Women on the Constitution, which will be making its presentation to you later on, because it was on that committee—the name of the committee, anyway—that those women came together and that was the essential motivating force. They would have far more of the details than we can give you.

**Mr. Offer:** Thank you very much.

1520

**Ms. Carr:** Thank you for the question.

**Miss Roberts:** I might continue on in the same vein as Mr. Offer. Thank you very much, ladies, for your concise information, your ideas and your great work in the past many years. I feel very inadequate seeing you three there and the people who have helped you and what you have done for the cause of all women in Canada. Your concern here today is well documented by your presentation, no matter how brief you think it is; but I know you have many other concerns, I can just tell that they are bubbling in there somewhere.

I do want to go back to the process, because no matter what we do with the Meech Lake accord that is a living document that is there, our Constitution, and it is going to change from time to time. What you did in 1981 and what you are doing now, which seem to be stopgap measures, that is not what the process should be. The process should be a building of consensus in some way towards a change. Do you have any thoughts on that?

What happens in the next 10 years? There is going to be development. The Charter of Rights and Freedoms is not going to stay as we know it today. The words that are there are going to be interpreted by courts and we are going to say, "No, that is not what is meant by that," and we are going to want to change it. What happens with section 15 in the next month or two, or year? We do not know. If the courts interpret it in a way you do not think it should be, you are going to be back asking to change that or develop it in some way.

How do you see us developing a process that is going to allow us to keep the Constitution in tune with a developing Canada?

**Ms. Gilchrist:** First, do not make the mistake that has been made now. Number one, I mean that is so disgusting, let us face it. Keep negotiating, keep talking to the women involved. There are enough women who are head of those groups and so on to continue the consultation, to continue the negotiation; talk to us and develop a kind of feedback and do not enrage us once more like we were in 1980. Maybe we need that, to have women so enraged, as we say in French, that we do something. We do not want to go through that process again, but I think that consultation, negotiation, that is what is part of our recommendation actually.

**Ms. Macpherson:** You are going to have to hear from all of us on this one.

**Ms. Carr:** I would just like to say on your statement that this Constitution is something that we have, that I think the amendment is so badly flawed that it is going to get in the way of that kind of consultation, and I think particularly the veto power of the provinces. We know we have a great deal of trouble getting all the provinces to agree. I think that is a big problem or it is a potential problem. I would like to see something changed in the accord so that it is easier to negotiate and to bring forward other amendments later on.

**Ms. Macpherson:** I would like to answer that. We have this feeling of urgency and almost desperation that if it passes in its present form we are going to be locked into a much more difficult amendment in the future. Now is the time, and that is why we are looking to Ontario as a possible hope that some changes—and vital ones—may be made before we are locked in to having to try to unravel the thing when it is already set in stone, so to speak. Granted, the courts will be there, but the legislative process is still with us. We feel it is urgently essential that some of those changes be made before the final agreement on the accord.

**Mr. Chairman:** I would like, if I might, just to ask one question and perhaps I could direct it to Ms. Gilchrist. Two days ago, in the testimony which L'Association canadienne-française de l'Ontario brought before us, and again in part of your submission today, there is, I think, a fundamental point that is made which, for me, as I examine the accord, goes right to the root and branch of the reason the accord came about. This deals with the "distinct society" and the franco-phone minorities outside of Quebec. I want to be very clear in understanding your viewpoint on this. When we hear about the different arguments as they affect charter rights, aboriginal rights and other sections of the accord, I can look at those and follow those through and see how one might be able to make a better accord without necessarily taking away what I imagine for Quebec is the fundamental point, which is the distinct society.

What ACFO said to us the other day, and what I sense you are suggesting as well, is that the concept of the distinct society for you as a French-speaking Canadian living outside of Quebec makes you feel as though something very fundamental has happened here in terms of your rights as a French-speaking Canadian, and perhaps in a similar vein an English-speaking Quebecker.



Do you see a way in which the concept of the "distinct society," which has been a fundamental request by Quebec since 1982, if not before, can be maintained in the Meech Lake accord or some other accord and also find a way whereby the official language minority groups are also protected? It just strikes me that that point is very fundamental to the reason we are even looking at the accord. As members of the committee, how do we wrestle with that issue of to what extent that "distinct society" appears to take away from French-speaking Canadians living outside Quebec?

**Ms. Gilchrist:** OK. Let me just start by saying that the only good thing about the accord is that we got Quebec into it, so we welcome that. I do not want to get too much into the debate on Quebec as a "distinct society," but I see a problem with Quebec women being called a "distinct society" because the government of Quebec cannot so discriminate them and they would have a double discrimination, one on the equality rights and one with the language.

What I do not like about the accord are those little boxes that you have put people in: minority rights, heritage and so on. I have fought a lot in this province to have a French public school here in Toronto, which is Gabrielle-Roy. It does not mean that I agree 100 per cent with what ACFO is saying and so on. I also see how people are living in Manitoba and the difficulty they had in order to get their language going.

I myself come from a country, Switzerland, where we have four official languages. I know what is very important when you have to keep your language, and I have never felt a second-class citizen in Switzerland, being French, as I have here in Canada. I am a Canadian number one and that is why this accord, to me, is really putting me absolutely, along with other women and other people of Canada—I mean where do I fit now? I do not want to fit; I am a Canadian.

**Mr. Chairman:** I want to thank you very much for joining us this afternoon and for presenting your brief. As others have said, you have put forward some very specific comments for us to consider and we are indebted to you for doing so. Thank you.

If I might call upon Joe Miskokomon, the Grand Council chief for the Union of Ontario Indians, to please come forward. Thank you for joining us this afternoon. We apologize for falling behind a bit, but we do want to make sure you have the time you need to make your presentation. Perhaps the best thing is if I simply

let you proceed and, following your presentation, we will pose some questions.

**1530**

## UNION OF ONTARIO INDIANS

**Chief Miskokomon:** I would like to take the opportunity to thank you and the select committee for allowing us to appear here today. Although the time is short, we would be pleased to reappear in order to elaborate on any specific issues.

If I may just address the kit that you have in front of you, on the right-hand side will be the oral presentation, which I will submit today, and on the left-hand side is a broader and more detailed version that you may wish to consider.

The Anishinabek nation is a confederacy of 43 first nations whose homelands stretch from the Hudson Bay watershed to the American border, from Windsor to the Ottawa Valley. Our people number 25,000 and are members of the Chipewewa, Ojibway, Delaware, Odawa, Algonquin and Pottawatomi nations.

Long before the Meech Lake accord, our elders and chiefs in assembly stated: "We are a distinct people. We have a distinct territory and our own lands. We have our own laws, languages and forms of government. We survive as a nation today."

As nations, we have never surrendered our aboriginal title or rights, including the jurisdiction over our own ancestral lands. Nor have we surrendered our ability to pass laws with which to govern our people. As nations, we made decisions to negotiate military alliances with the British crown. Later, the Anishinabeks signed 44 treaties with the crown which delineate specific obligations to our people. In making these treaties with your forefathers, the crown formalized its recognition of our sovereignty.

Canada has a tradition, inherited from Great Britain, to acknowledge the sovereignty of aboriginal people. The treaty was a specific instrument for the relationship between nations. Our distinct status as sovereign powers rather than subjects of the crown was reflected in our absence from the conference that resulted in the Constitution of 1867.

We turn our minds now to the Meech Lake accord and the amending process. We, like others in Ontario and Canada, must express serious reservations about the process used to develop the Meech Lake accord without meaningful input. Historically, our nations used consensual processes to define direction, action and, ultimately, laws. Perhaps the various

forums which you have now established, such as royal commissions and special hearings, are evidence of participatory democracy as traditionally practised by our people. Unfortunately, these opportunities were not used prior to the drafting of the Meech Lake accord.

Provision 16 of the accord has been the subject of much criticism and suspicion by the first nations with respect to the intent of the first ministers because of its reference to section 35 of the Constitution Act, 1982. Had we been participants in the Meech Lake discussion, this particular controversy could have been avoided.

With regard to Quebec as a "distinct society," we are pleased that Quebec has achieved its objective of amending the Constitution Act, 1982, and has successfully sought the consideration of specific issues to meet the needs of its constituents.

However, the Anishinabek have grave concerns with the amendments which have been proposed to accommodate the objectives of Quebec and other provinces. A key element of one such amendment is the principle that Quebec constitutes a "distinct society" and incorporates a concept of French-English linguistic duality as the only fundamental characteristic of Canada. This amendment implies, and may be so interpreted by the judicial system, that aboriginal people and our cultures are not a part of the fundamental characteristics of Canada.

The provision of this amendment, in particular, would impose great difficulty on our attempts to secure recognition of our aboriginal languages. These languages are rapidly being lost, a loss which we believe should be seen as a tragedy of national proportion. An old Cornish proverb says, "A tongueless man gets his land took."

There are several other arguments which could be made against this amendment, but all of them converge on one serious concern. While this new provision appears merely descriptive, by outlining one fundamental characteristic of the country, over time it may become prescriptive and be taken to determine the fundamental characteristic of the country. In the absence of constitutional recognition of aboriginal governments, it is likely that the "distinct society" provision will pre-empt constitutional acknowledgement of the reality that Canada is a country whose fundamental characteristics include the existence of aboriginal government. We, as Quebec prior to 1987, know well the feeling of being on the outside looking in.

We turn towards the federal trust responsibility and spending powers. Section 91(24) of the Constitution Act, 1867, specifically defines the federal government's responsibilities for "Indians and lands reserved for Indians." Pursuant to this clause, the government has introduced the Indian Act, which describes a "trust" responsibility for Indian people. As principal trustee for the Indian people, we charge that the Prime Minister, in the Meech Lake accord and subsequent discussion, was derelict in his responsibility for the protection of our rights and those of the northern aboriginal people.

It is clear that the provisions of the Meech Lake accord affect the balance between federal and provincial powers. Ultimately, this may mean that the federal government's ability to fulfil its responsibilities under section 91(24) of the Constitution Act, 1867, in both the letter and spirit of the treaties and other obligations, may be compromised.

In particular, we have grave concerns that the Meech Lake accord shifts the distribution of spending power and may impair the government's fulfilment of financial obligations to Indian people. The proposed amendment allows the province to opt out of national shared-cost programs, with compensation, providing that they pursue similar programs or initiatives that are compatible with the national objectives. This poses some fundamental questions.

How does section 106A influence the possibility of aboriginal people participating in the establishment of national objectives? What would be the result if the first nations chose to be included in a national shared-cost program while Ontario opted out? How might section 106A affect the abilities of the first nations to establish their own objectives, criteria and standards for funded programs? Finally, what are the relationships between national objectives, cost-sharing, opting out and agreements such as the 1965 welfare agreement in Ontario?

It is our analysis of these questions and considerations of federal jurisdiction delineated in section 91(24) of the Constitution Act of 1867 which requires us to reiterate that our access to federally funded programs must be maintained and enhanced.

With regard to the creation of new provinces, with respect to section 41 of the accord, necessitating unanimity for the creation of new provinces, all of us, including provincial governments, have known for some time that the aboriginal people of the north aspire to provincial status. This is no big secret. The Northwest



Territories and the Yukon are the only remaining regions in Canada in which native people represent a significant percentage of the electorate. This veto power negotiated by the provinces seriously impairs an expression of aboriginal government in Canada.

Clearly, we must address the role of the existing provinces, an issue which goes to the heart of the special relationship which has always existed between the federal and the aboriginal governments.

We move on to the first ministers' conferences. We concur with the other first nations that a timetable be established to prepare for further constitutional conferences on aboriginal rights. We must continue to insist that aboriginal people have equal, ongoing participation at those conferences at which the agenda will address items of paramount significance to our people. This protection was afforded with section 37 of the Constitution Act of 1982. We note that the first ministers did not choose to reinstate these provisions.

A specific agenda item for future conferences will be the "roles and responsibilities in relation to fisheries." Fishing is both an aboriginal and treaty right, and the proposal that the governments will discuss and negotiate amendments through this process no doubt will impinge upon our constitutional rights.

For example, the discrepancy in the interpretation of our rights has resulted in the Ontario government paralyzing the fishing agreement negotiations with the Union of Ontario Indians and the subsequent implementation process of the first nations. Our ability to legally exercise our constitutional rights has been denied until interest groups are politically aligned. If this practice is allowed to continue, the exercise of aboriginal and treaty rights will remain a mirage for our people.

#### 1540

Our principal intention during the first ministers' conferences has been to seek constitutional protection for our right to self-government. Many discussions have focused on concepts, institutions, jurisdictions and authorities which might be sought by first nations. Some of the provinces have declared that the concept is too vague.

The first ministers demanded the most detailed explanation about the nature, practice and implementation of aboriginal governments. We were told repeatedly that no clause could be added until such time as all parties agreed on the wording and interpretation, yet the Meech Lake

accord proposed the concept of a "distinct society," together with dozens of other new constitutional phrases which do not provide clarification of intent, scope and implementation.

These types of political understandings are crucial. Currently, the Assembly of First Nations is intervening in *Regina v. Sparrow* in British Columbia. This case, now before the Supreme Court, will be a test case of section 35 of the Constitution Act of 1982. The court will now clarify our aboriginal rights. This interpretation of constitutional clauses belongs within the political process, rather than a judicial system in which legal assessment may not recognize the original intent nor our understanding of the wording.

We strongly believe that the political will in Ontario can facilitate amendments for aboriginal self-government.

In conclusion, at the beginning of this presentation we stated that we had our own laws and our own system. The exclusion of aboriginal people from the decision-making process at Meech Lake can only lead us to believe that the first ministers continue to view the first nations as outside of the governing circle of the Canadian federation. We find ourselves in a position much like Quebec's following the patriation of the Constitution in 1981.

Governments are more than convenient arrangements. They are expressions of determination to shape a nation and to reconcile collective and individual rights in a way that incorporates founding principles or fundamental characteristics of that nation. This is why the absence of aboriginal government in the Constitution is so distressing. A sense of vision and purpose which constitutions exist to articulate seems to continually be denied the aboriginal people. Collective as well as individual rights may, in a certain sense, be protected by constitutional provisions which are now in place, but collective destinies within the nation of the sort that only we, as aboriginal people, can claim to have are not allowed expression—not yet, not in the absence of an existing recognition of a place for aboriginal governments within the new constitutional guarantee.

To disregard this opportunity for nation-building that the constitutional reform would afford does a disservice to all Canadians. By affording our people respectful recognition in the Constitution as fully legitimate partners in the development of Canada, everyone stands to gain. What has been an obstacle would instead become

a gateway for the liberation of our full creative capacities.

There is much to be gained by achieving this constitutional recognition, especially for aboriginal people elsewhere who do not have the opportunity to deal with these essential matters. Ontario and Canada therefore have much to contribute and have an obligation to provide international leadership in this area.

The Anishinabek acknowledge that the Constitution allows for interaction between individuals and groups in a complex way. It must be flexible to allow for the various needs and visions of the members and to provide opportunity for dialogue. It must allow for those people to relate in political activities. But a Constitution which limits the possibilities and opportunities which are sought by its members, especially representation, self-determination and democratic processes for seeking amendments, must be questioned.

The Anishinabek therefore present the following recommendations with regard to the Meech Lake accord.

1. We urge the select committee to express serious reservations about the process used to develop the Meech Lake accord, which excluded the aboriginal people of Canada.

2. We recommend change to the proposed amendments to subsection 2(1) to the Constitution Act, 1867, to also acknowledge aboriginal people and to affirm that the aboriginal governments will be an expression of that fundamental characteristic of Canada.

3. We recommend that access by first nations to nationally funded programs, despite provincial decisions to opt out, be recognized within subsection 106A(1) in order to preserve the federal jurisdiction and obligations delineated under subsection 91(24) of the Constitution Act, 1867.

4. We concur with the recommendations of other first nations that the amendments regarding the creation of new provinces be completely deleted, returning to the original provisions of the Constitution Act, 1871, which allows for bilateral agreements between the federal government and the new provinces.

5. We recommend that future conferences be constitutionalized with a view to finding mechanisms for bringing aboriginal people and their governments into the Constitution and, further, that the proposed amendment adding subsection 50(2) to the Constitution Act, 1982, recognize our equal participation in future conferences which include agenda items of significant importance to us.

The inherent right to self-government: we recommend a process by which consensus can be achieved by aboriginal people and the provincial and federal governments for constitutional entrenchment of our inherent right to self-government; specifically, that a provincial-aboriginal forum be established within Ontario with the purpose of developing an agreeable amendment to the Constitution Act, 1982, with respect to aboriginal self-government. This agreement must reflect a government-to-government relationship.

We recommend that processes be developed by which Ontario will encourage its provincial counterparts and the federal government to consider the Ontario amendment in an effort to seek national consensus prior to a new first ministers' conference on the recognition of aboriginal rights to self-government; that Ontario identify sufficient human and fiscal resources within the provincial government to address the above recommendations; and finally, that adequate resources be provided to aboriginal groups, including the Anishinabek, to ensure that we are able to articulate the principles and develop practical proposals about the nature and scope of aboriginal government and its relationship to other levels of government.

No one is more aware of the political minefields that Indian politics encompass. You have been charged with the responsibility to bring in a report that shows consideration for all people. We trust that the Great Spirit will watch over you and your committee in this time and guide you in your deliberations.

**Mr. Chairman:** Thank you very much for a very clear and specific brief, particularly the recommendations you have made at the end, including those to do with self-government, which was an issue we did touch on briefly this morning and which I think will be of interest to us as we proceed this afternoon. As you say, we also have your fuller brief, which we can refer to as well.

**Mr. Sterling:** Thank you very much for coming. In your document you say that had you been participants in the Meech Lake discussions you could have avoided the problem with regard to provision 16 of the accord. What would you have said to them with regard to that, as it affects section 35 of the Constitution?

1550

**Chief Miskokomon:** It appears to many aboriginal people that section 16 was almost placed in as an afterthought to protect or shield section 35. We had the same experience in the



development of the first Constitution, where the aboriginal section was dropped and then placed back within the Constitution as political pressure was mounted on the government.

Once again, to many of us who have worked within the constitutional process for many years, this is a shielding effect or an afterthought effect. It is not a proper thing, when people build constitutions, that as an afterthought you include people back in. If a constitution is going to be built, you do not build a constitution and then come back out and say: "Oh, you are back in, congratulations. We have done a good job for you." That is not patting us on the back. That does not help us; it is an insult to us.

**Mr. Sterling:** You mention that you believe the political will in Ontario can facilitate amendments for you. Are you talking about the Meech Lake accord in this regard?

**Chief Miskokomon:** Currently, there are two schools of thought: Ontario's and that of the aboriginal people in Ontario. Ontario feels it has an agreement that was moved within the last constitutional conference, but that all Indian people in Ontario had rejected. What we are saying is that in order to gain unanimity on constitutional amendments as they affect aboriginal people, that process should be put in place. The timing has to be right because, in terms of the aboriginal conference that happened last year, I think everyone here can count the number of provinces that were on side and the number that were offside.

It does not seem very productive to continue to have constitutional conferences and to continually walk away denied of one's rights. It seems perhaps more productive that aboriginal people within Ontario begin a process with the government of Ontario to start establishing processes and establishing amendments and wordings that can lead to those agreements rather than to failures. That is what we are suggesting.

It is not very healthy to go to an aboriginal conference with the first ministers, after all the time and energy our chiefs and our councils and our people put into it, after meeting after meeting, and after defining as clearly as today is outside what we are talking about, to count the numbers around the table and to find we do not have them. It is not a healthy feeling. I do not think the first ministers particularly care for that. I know, from our side of the table, we do not.

**Mr. Sterling:** You mention in your report that you feel betrayed by the Prime Minister with regard to his representing you in the Meech Lake accord hearings. Due to the fact that we have

more aboriginal people in Ontario than does any other province in Canada or the territories in one jurisdiction, do you feel that our Premier has adequately represented your interests at the Meech Lake accord?

**Chief Miskokomon:** I believe that the people who will represent our interests at any constitutional conferences will be us. I do not trust any government to protect our rights based upon our numbers within the Canadian society. We have our own processes of electing our own people and of putting our own spokespersons forward, and that is the only way I feel comfortable that our rights are being protected.

**Mr. Sterling:** So while you criticize the Prime Minister, you are not willing to criticize our Premier.

**Chief Miskokomon:** I criticize the Prime Minister specifically because he is charged under subsection 91(24) of the Constitution and has a legal obligation through the Indian Act to uphold treaty rights and is furthermore charged under the Constitution Act of Canada, the highest order of law in the land.

**Mr. Sterling:** Thank you.

**Mr. Breaugh:** I appreciate that in your brief you have gone into more detail than some other groups have. I want to see if we can put a framework together here.

The other groups and the joint committee have talked about this first ministers' conference in 1990. I take it you are not in disagreement with that. What you want is something before that conference and something afterwards. You want to make sure that it does not just happen in the way that other conferences on aboriginal rights have happened, that there is a process leading to that and that the conference will be the culmination of efforts to establish, if not a final solution at least a final path to a solution. Am I getting the drift of your argument here?

**Chief Miskokomon:** First of all, I am not stuck on 1990. The year 1990 is just a date to me; it will be 500 years after the Europeans landed on our shores. A few more years does not mean very much to me. What does mean a lot is a co-operative spirit as we move along in terms of developing a constitution. We cannot afford to have a feeling that there is a win-lose situation. If we cannot come out of a constitutional process, regardless of the timing of it, where everyone has a good feeling that we have all won something, a rightful place in this country, then there is no sense going to these conferences.

What makes a lot of sense is that we have a clear commitment that we will work in co-operation, not in competition, with Ontario and with the federal side in order to move these amendments along. If in fact we take the closing statements of the premiers at the first ministers' conference in 1987 with us, and we take them at face value—and Mr. Peterson and Mr. Mulroney said that they will work towards establishing aboriginal self-government in Canada—then why are we here a year later without a process? Why in fact did the federal government stop the funding to the national organization necessary to continue the work that is going to be required to bring sufficient numbers on side to amend the Constitution?

We do not have a process in Ontario to follow that through, and unless we keep the issue on the burner it will gradually drift away like yesterday's news.

**Mr. Breagh:** Let me make an argument, if I can, for the 1990 date. The concern that I have is that if this accord gets finalized, it seems that for many people in our country the rules change completely; their opportunity to get some reasonable redress of wrongs that are 500 years old changes substantively. So in my mind, I would be a proponent of the 1990 date if we do two or three things.

First, put in place a process—and that is both a decision-making mechanism and a funding mechanism—so that the purpose of the exercise is to have some clear resolution on the table that it is the conclusion of a process by 1990. If we do that, my concerns about carrying through this accord are lessened substantively. If by that date I know that a lot of things have happened, but we have had a clear decision or mechanism that says the Charter of Rights and Freedoms has some supremacy over this accord, I will not be terribly worried about some of the questions that have been raised about that during the discussions of this accord.

If we have found some way to accommodate the Yukon and the Northwest Territories in that time frame and we proceed with this, some of my concerns will be alleviated. If we have found some mechanism that is working, and we all agree that it does not have to work perfectly but it is under way, and we have a first conference in 1990, which would be just before this thing would be finalized, any concerns I have about what is in the Meech Lake accord concerning aboriginal people would be seen in a totally different light.

That is the argument I am making. I have got to see some progress in the next couple of years that shows me we are on the way to resolution or we have changed our attitudes substantively or we have really changed the process a lot. If we do that, then the Meech Lake accord does not bother me nearly as much as it does now. My concern, frankly, is that if this accord goes as is and none of these other things happens, some very important Canadians have lost their opportunity even to be participants in constitution-making in this country.

**1600**

**Chief Miskokomon:** I believe that our experience within the constitutional process has been that two years slips by very quickly. When we started in it in 1982 and into 1983, we essentially ended in 1987 with the same numbers. After going through five years of that without commitments on a national scale, that time flew by very quickly and very little was accomplished. I do not think that by 1990 the political will will be in the rest of Canada. I do not think that the governments in the west are going to change their position very substantively unless something drastic takes place. I do not see that on the political horizon.

As pragmatists, we have to say that we are into the fight for the long term, regardless of the time frame that it takes. If Ontario is on side with us and wants to be a partner with us in Confederation, then it has to make some real progress and show something serious to us. They have to stop charging our people in court and appealing and appealing and appealing those decisions when they come in our favour. They have to sit down and start talking about how we institutionalize self-government here on the ground and begin some meaningful, significant negotiations, and not play the game of receiving federal dollars, overcharging the feds, taking the money and running and saying: "To hell with the Indians. We'll deal with you later on. You are only one half of one per cent of the population of Ontario." That is the experience we have had.

The year 1990 does not mean very much to me. What I would like to see is a real commitment from the government of Ontario to go with us the long road and do it until we get what we want.

**Mr. Breagh:** OK; fair enough.

**Mr. Elliot:** Thank you very much for your frankness. I would like to begin my comments by trying to communicate with you the fact that I have been most impressed not only with your



presentation but with the other two presentations over the last several days.

My concern is the commitment to the long haul. If I read things correctly and have understood what you have all been saying to us, I see a number of sovereign states in your mind as being the Indian position and the Inuit position across Canada. I can see, as the government of Ontario, having a great deal of dialogue and making a lot of mileage in some of the things you just stated in your answer to the last question.

Now, Ontario is not a sovereign state; it is one of the provinces. In the long haul, I can see Ontario and your peoples in Ontario coming to an accommodation in a lot of ways. I would like to look down the road a bit when we get to the situation when we are talking about a first ministers' conference, and relative to your demand to be represented in such a forum I am wondering how you will evolve from the situation when you are talking to Ontario with respect to your people in Ontario and tying that into the national group so that at that forum you are heard all across the country.

Do you see this happening province by province from this point on, or do you see it happening in a national vein? I have counted up the provinces. I think there are probably four that are not being very accommodating at the present time. Some others are being more accommodating. They are in an array as you judge them province by province in this regard. I am not sure that the lead by Ontario will be sufficient to get other provinces to think uniformly as we do with respect to co-operation.

I know that in 1985 a stance was taken by the government of Ontario that is compatible with what you wish. The problem is that, as you say, very little, if anything, has been done with respect to real accommodation. I see it as a long-range plan too. Where I am having difficulty getting a handle on the whole thing is, when you sit down at the first ministers' conference down the road someplace, who is going to be representing the views of the aboriginal people all across Canada?

**Chief Miskokomon:** The national chief will be representing the views of the Indian people across Canada, just as he did at the last conferences. We will feed through the mechanisms of political structures we have which feed into that, in much the same way that Ontario and other provinces feed into the federal structure in terms of federalism.

How does Indian sovereignty sit within Canada? I think we can look to other experiences

around the world and how aboriginal people either govern themselves or work in co-operation with other governments. We can look towards the Maori experience; some good things have happened in New Zealand that we can look to. We can look south of the border, to the Navajos, to the Hopis, who control their own judicial system, who control their own policing, who control their own enforcement agencies in the administration of law, compatible with the state, compatible with the federal system. We can look to many experiences.

To assume that the Constitution is going to clearly lay out everything that has to be done within Ontario, or any other province for that matter, is an overassumption. I believe when the Constitution is developed, principles are enshrined and are articulated within the Constitution, rather than the specifics of implementation.

When we talk about self-government and sovereignty, we talk about it in those ways. When we talk about implementing, it is up to the Indian people of Ontario and the government of Ontario to sit down and talk about how our jurisdictions overlap with your jurisdictions. In fact, you will have to repeal your laws to make sure Indian rights enshrined within treaties in subsection 35(1) are going to be guaranteed, that we are not constantly at each other's throat, either in court or on the political football field.

We are very tired as aboriginal people, as Indians, of being the political ping-pong between the federal and provincial governments. We want to clarify that. We want to talk about jurisdictions, not only with you from a government-to-government relationship, but we also want to sit down and talk to the feds in the same way and clarify subsection 91(24) and what our interpretations of "treaties" are and what our interpretation of "land claim" is.

It is a funny thing. We owned all the land and we made treaties, but all of a sudden we have treaty rights. It seems to me that if we made the treaties, you are the people who have treaty rights. It is a very strange interpretation of history, but that is what history is about. We have to go back and we have to clarify those things. We have to straighten history out. We cannot change what happened in the spring of 1987, but should we allow it to repeat?

I do not think anyone here is satisfied with the status quo or you would not be here. I do not think that is the purpose for which we come here today. We are not satisfied and we are not going to stop pushing. If necessary, we are not going to stop going to court and we are not going to stop

being at each other's throats. We are going to push until we get what we want. It is like the Fram filter man says: "You can pay me now or you can pay me later." One of these days we will come to an agreement.

**Mr. Elliot:** I would just like to comment that you may have a lot more support than you recognize at the present time in your endeavours. I hope you keep up the good fight. I have been very impressed.

**Mr. Allen:** I am very impressed with the presentation you have made, Chief Miskokomon. I note some rather new items you are putting on the table for us; for example, items such as the federal government has responsibility and a trust it should be delivering on. What happens with regard to native peoples when provinces opt out of federal shared-cost programs? That is a very interesting question to pursue that line of thought. I suspect one could make a significant amount of mileage on that one. Certainly, you would unscramble a few constitutional heads and dominion-provincial consultations by putting them through the process of having to work that one out. I think that is a good one to lay before us, the whole question of the intersection of your national objectives as a people, as you are trying to define them, with other people's declared national objectives and so on under the appropriate section—106, etc.—in the Meech Lake agreement.

Your colleagues have laid before us their anxiety and their anger, which you have not quite put in so many words, with respect to the fact that it was so easy to define "distinct society," or at least to get the "distinct society" language into the Constitution for Quebec, whereas it was so difficult to do that with regard to aboriginal peoples.

**1610**

I guess my only comment in that respect is that Quebec had the good fortune already to be a politically defined entity in the Constitution, with rights and powers and all the rest of it. What you are trying to do is not only to get recognition as a "distinct society" but also to get the structure in place to give some life to that. That double process obviously makes it much more difficult, especially since you are running up against other people's power all the time when you try to do that.

You were not here this morning, but you are the second group today to propose that for those who exist, if you like outside the law, as l'Association canadienne-française de l'Ontario put it the other day, some form of commission or

public body in Ontario be struck to work towards defining more clearly in Ontario terms the status of cultural groups—"distinct societies," if you want to use that language—that exist within Ontario, to try to give some shape to that. I must say I am quite intrigued by that proposal of your provincial aboriginal forum.

Coming to my question, I was not sure whether I heard you correctly with respect to Mr. Breaugh's questions, so I want to come back to that. Were you saying in response to him that really 1990 and the next round of first ministers' conferences are quite unimportant to you? You have been through the process. You have really given up on that. It is not going to get you anywhere within that time span and therefore you are not going to go for it, getting yourselves on the agenda, and we should not bother with that either.

If there was one simple amendment that ought to be the easiest thing to do with regard to Meech Lake, it should be simply to add renewal of discussions of aboriginal rights to self-government as an item on an agenda. Were you telling Mr. Breaugh that was not something you were concerned to go after at this point, because you have been so disillusioned?

**Chief Miskokomon:** What I was saying, sir—and I do not want to leave the committee with this misinterpretation; I would like to be very clear on it—is that 1990 is not a significant date in terms of whether or not we have an agenda item there. What is significant in terms of 1990 is whether or not we as Indian people in Ontario can work out processes that will bring other people on to the constitutional bandwagon for aboriginal rights.

We want to have an agenda that clearly will be recognized as an implementation process for self-government and not as an attachment to someone else's agenda. It seems to me that if we were placed as an agenda item somewhere else, we lose the control again. The constant struggle is for Indians to regain some of the control over their own lives, some of the responsibility we feel our leaders should have towards our own people, not to someone in Ottawa or not to someone within this Legislature. The constant struggle that we have is that control is not being relinquished. Therefore, we are at a point of having to take it. To be placed on another agenda is like taking another back seat.

The agenda that was established with regard to aboriginal and constitutional affairs, which went for four years, was something that was very productive and highly educational to many



governments, because they have never dealt with the questions before, but we have to stop educating all the time.

We are in for the hard road. I was born Indian; I will die Indian. People are elected and then they are gone. New governments come in, new ministers come in and then they are gone, and we are constantly in the process of educating legislatures, MPs, MPPs. It is time to lead, follow or get the hell out of the way. We want to move forward. We do not like the conditions our communities are in. We do not want to stand for that. I do not think anyone in Canada should have to stand for that.

What we are saying is that we want to be within the constitutional federation. We want to participate within the Canadian economy, within the Canadian lifestyle. We do not want to be seen as welfare people; not within our own country, not within our own land.

**Mr. Allen:** Those are objectives you ought never to give up on, but I submit that, as you march forward trying to accomplish them, you will go on educating us whether you want to educate us or not, and I think that is good.

Do not get me wrong. I am not questioning what you want to do in Ontario. I think that is a very important proposal. I think you should go for it and I think we should give you all the support we can, because it would begin to define the issue and make it more concrete for a lot of people. Perhaps it could begin to make it more concrete across the country as a whole.

All that I would submit is that I think you should keep your eye on the possibility that two or three governments might well change hands in the course of the next two years and that might change in a significant way what goes on at a first ministers' conference, because the numbers were not all that far away when things ended in March, were they? One could see that there was a possible light at the end of that tunnel, but the numbers were not quite there.

**Chief Miskokomon:** One was not sure whether it was another train or daylight there, though.

**Miss Roberts:** I just have a couple of comments, if I might. Mine are to congratulate you as well on your determination to have self-government and self-determination and your emphasis on the fact that you are in there for the long haul, the long road, until you get what you want. But the most important thing you said afterwards was "through an agreement." It is very important to me, and I think to everyone else here, to realize that is the process you are looking to, to have an agreement with and to come to

some realization with both federal and provincial governments on your position, which has historically been in Canada and in Ontario but has not legally been recognized.

I think the other comment by my friend Mr. Allen referred to one simple amendment to the Meech Lake accord, but I think what we are seeing here in this process is that there is no such thing as a simple amendment to the Charter of Rights and Freedoms. What they considered they were doing, simply allowing Quebec in, or arranging things so that Quebec could come in, has turned into a complete rethinking, a redevelopment of some of the rights of many other groups in Canada; or it may have turned into that.

I hope your participation today and your thoughts today can help us develop a process not only for the first ministers' conference, whether it is in 1990, 1992 or 2001, but that you can help us develop a process in Ontario to start in the appropriate path that is your agenda.

My question after saying all that is very simple. Does the Meech Lake accord in a fundamental way stop you from your agenda?

**Chief Miskokomon:** That is not such a simple question.

**Miss Roberts:** I get rough.

1620

**Chief Miskokomon:** It impedes, to a large extent, because I do not believe that a lot of things were constitutionally thought through. I believe that if words are put into the Constitution they will be nearly impossible to take out. Unless we are very clear on what those words mean, it seems to me counterproductive that we leave it to the courts to continually interpret political will. The courts in Canada do not go that far. They are not as liberal as they are in the United States where they move political will along.

It is the politicians in Canada who have to understand what they putting in and why they are putting things into the Meech Lake accord; or why they are putting things into any part of the Constitution, regardless of whether it is Quebec and Meech Lake. The aboriginal people north of 60 have had resources, much like the aboriginal people south of 60, and have lost them through treaties; and those treaties have been constantly under question by our people because it is not our interpretation of Canadian history. Yet when we face the bigger population, they turn their back. It is as if treaties were the final solution. There was someone else who practised the final solution back in the 1930s. He did not get too far.

In the case of the aboriginal people of the north, with the massive land space that they have

in Canada, the amount of wealth they have to generate a self-sustaining government, the governments of Canada essentially closed the door on the people. It must be a very disheartening thing for the aboriginal people of the north to see that, once the Meech Lake accord comes into effect, they are no longer considered a "distinct society". Only the French and English in Canada have their distinctiveness. The original people of Canada have nothing to claim in the Constitution: not the land, not the laws, not their own government, not even their own distinctiveness through their culture and their language.

When you sit on our side of the table you can only be slapped so many times. That is what I think Meech Lake does to us; and yet as our regional chief said yesterday, we are prepared to go on one more time and try to negotiate our place in Canada, in our land.

**Mr. Chairman:** Thank you very much, Chief Miskokomon, for coming here today and for the very thoughtful presentation and the recommendations. As many members have said, you have introduced, certainly for us, some new concepts, ideas and new directions which I think we want to look at very closely as we prepare our own recommendations. I thank you again.

**Chief Miskokomon:** Thank you.

**Mr. Chairman:** I next call upon Leslie Smith to come forward. If I could, while you come forward, I apologize for the hour.

**Ms. Smith:** I just hope I do not faint from hunger. I have had only two cookies today.

**Mr. Chairman:** Would you like at least to have some water?

**Ms. Smith:** This is for the fire in my belly.

**Mr. Chairman:** We had thought we might be at this point earlier, but I would simply say that if you would like to proceed with your presentation, I am sure we will have some questions. If we can proceed that way, please go right ahead.

#### LESLIE SMITH

**Ms. Smith:** I am sure everything I am going to say will have been said before and will be said again, but I would just like to run through this and see what happens.

My name is Leslie Smith. I am not a representative of a special interest group unless, as a citizen of this country and this province, I could be said to represent countless others who, like me, have serious reservations about the Meech Lake accord and no elected representative willing to speak for them.

I thank you for the opportunity to address this body, but you will forgive me, ladies and gentlemen, if at the outset of our discussions I express the suspicion that no matter what I personally say and do, no matter what the opinions of the other speakers at these hearings, the net result of all our—and your—efforts will prove to be nil.

Nevertheless, for the sake of this country, I feel compelled to make the attempt. The situation is one where, to quote that great parliamentarian Edmund Burke, "All that is necessary for evil to triumph is that the good do nothing."

From its inception, I have felt that the Meech Lake accord represents an evil to our nationhood. If left unchecked, it would go on to destroy the very fabric of our government as assuredly as would a civil war.

Yet by what methods are concerned Canadians like myself empowered to fight this threat? Firearms are impossible, however desirable, and as yet our current elected representatives prefer looking out for their own parochial interests rather than adopting for themselves the more challenging role of statesmen.

If this indeed were a physical war, I would, despite present military restrictions on women in the military, be one of the first to man the barricades. As what we are facing now is an internalized—but just as deadly—struggle, I am forced to rely on strong words and to trust in your common sense and goodwill.

Let us, then, use these hearings as a truly democratic tool and not merely pay cynical lipservice to the process of democracy.

What is the democratic process? Our friend Edmund Burke says, "It is what the people think so." Webster's dictionary calls it "government in which the supreme power is vested in the people and exercised by them." The very word "democracy" has at its root the Greek word "demos," meaning the people.

So why are the people of this country not consulted when radical changes are proposed to their Constitution? You can say, "They are consulted, through their representatives." But I will answer, "How, when all are afraid to oppose and none are given a free vote?" You can say, "Well, we do have these hearings." But we all know that Premier Peterson, like Brian Mulroney, has already stated that these hearings will in no way affect his support for the accord nor the obligated support of his party underlings.

Further, we have all seen how the few mavericks brave enough to stand up for the



democratic principles have been figuratively bound and gagged and hustled off into oblivion.

Along with many other thinking people of this nation, I have reached the conclusion that the actual procedure involved in the formulation and ratification of the Meech Lake accord as a part of our Constitution is fundamentally unconstitutional.

To change our country's charter, and therefore its underlying philosophy, ability to function and future direction, without direct consultation with and approval by the majority of the people in this nation is counter to the democratic process and inherently un-Canadian in that our Constitution guarantees us the right of true democratic process.

To implement Meech Lake in the face of this fact would be a political crime of the highest magnitude against the people of Canada.

If I were given a real democratic forum in which to voice my specific objections to this soi-disant accord, I would begin by saying that virtually every clause within it, in my opinion, contains egregious errors.

To start with the one clause that has taken on supreme prominence, let us look closely at the conferral of distinct status on the province of Quebec.

No one in this country is unaware of the fact that Quebec differs greatly from, say, Alberta. Does it necessarily need to be embedded in our Constitution? And if Quebec can thus be singled out as distinct, would the reverse rationale not equally apply to Alberta? And BC? And Nova Scotia? Are these provinces any the less because they are not accorded status as "distinct societies?"

Is Quebec distinct simply because it is a province where the French language and culture are a large part of its heritage? If Canada historically, traditionally and legally is a bilingual, biheritage nation, why then is all of Canada not classified as distinct?

Further, Quebec cannot claim the sole possession of French speakers or citizens of French heritage strictly within its borders. Is it then distinct merely because a long time ago Lower Canada existed in the approximate area where modern-day Quebec now lies? In this case, as English and French are our joint ancestries, why is Ontario, the modern equivalent of Upper Canada, not also granted a special epithet?

As well, and taking the federal government's approach to multiculturalism to its logical conclusion, why are all Canadian regions with predominant ethnic groups not also declared

distinct? While we are about it, how can we turn a blind eye to native Canadians' claim for special status?

Is it fair for any one group within this country to be so singled out, especially as no one can say for sure what effect such status will have on the application of our Charter of Rights or on the ultimate allegiance to our nation of the favoured province?

### 1630

We have been informed by Brian Mulroney that this "distinct society" title is simply a harmless sop to Québécois pride. But judging from all the fuss and pomp with which he and Robert Bourassa have saluted this sop, we may all be forgiven for seeing it as something a trifle more than negligible.

If it were, in truth, nothing more than a cheaply held honorific, just why has M. Bourassa so eagerly embraced this insult, becoming the first signatory Premier to the accord and, moreover, labelling its every opponent a cultural bigot?

Personally, I do not feel myself a cultural bigot for continuing to believe in Canada's dual heritage, nor for dreaming that one day this entire nation will be fully able to embrace both our traditional cultures and languages. What I do find bigoted are those people and provinces who prefer to stick with their own kind to the exclusion of those who have a constitutional right to equal treatment.

Finally, we reach what the politicians claim is the crux of this "distinct society" clause. They trumpet loudly that this will bring Quebec back into the constitutional fold. Now I may be just a common, garden variety Canadian citizen, but even I am aware that Quebec is already a part of our constitutional Confederation, whether or not the province itself was an actual signatory to the original repatriation.

It is stunning to me to see all three of our federal leaders blinkering themselves to this fact. One would almost suppose that they were more concerned with garnering Québécois votes for the upcoming federal election than with the future of this country.

Almost as egregious as the inequities of the Quebec clause are the errors of judgement contained in many other accord provisions—take granting the provinces the right to submit names for Supreme Court and Senate appointments. While we have been reassured by Mr. Mulroney—and who could question his sagacity or veracity—that this measure is temporary and that the Prime Minister would be bound to consider

such submissions only as possibilities, I would venture to suggest that political realities might well turn suggestions into demands and temporary expedience into permanent strictures.

Why, in the first place, should provinces be given the right to dictate in obvious areas of federal jurisdiction? Yet another egregious example of the erosion of federal responsibilities is the provision that will allow provinces to opt out of national initiatives while still receiving full financial grants for the institution of programs similar to federal directives.

Setting aside the vision of a nation where the basic guarantees and standards of life vary drastically from one province to the next, this proposal would effectively bind the hands of future federal governments in terms of their being able to implement constructive social, financial and other policies for the benefit of the nation as a whole.

Let us turn the light now on that clause wherein it is stipulated that any future changes to the Canadian Constitution must receive the approval of all 10 provinces as well as that of the federal government. This is the area that so greatly interests the Yukon and the Northwest Territories. Will they lose out on provincial status if it eventually comes to the vote? Can indeed the will of the vast majority of Canadians be stymied by one recalcitrant Premier in, say Prince Edward Island?

You have already been informed at these hearing that this question is purely academic, as the Yukon and Northwest Territories have populations small enough to make them ineligible as full provinces. That response ignores the possibility that in some future era their population levels could conceivably come up to scratch. It also ignores the pertinent query of how PEI itself would fare if it were applying for provincial status today.

But the application of this approval clause would have far greater-reaching effects than those in this one example. Can any constitutional amendment ever be agreed on unanimously, unless, of course, the provinces were first softened up with gift packages of ever-increasing power just like those they have already been ceded for agreeing to the accord itself?

It is more than plain from constitutional conferences of the past 10 years, let alone those of over 120 years, that national unanimity, despite Mr. Mulroney's sometimes protestations, is a near-impossible ideal. In the instance of the Meech Lake accord, we have achieved only a sort of unanimity yet to be actually

confirmed, and this at the high price of castrating for ever federal authority.

We should soon enough see, if this accord is enacted, how long it would take for the provinces to gain complete control over our federal government, for there is another clause in it that calls for permanent biannual first ministers' conferences on constitutional questions and other matters of federal preserve.

Therefore, twice a year, little pieces of our nationhood can be chipped away at random, all in the name of parochial provincial concerns. Are there any of us, particularly after witnessing the shameful sham tactics involved in passing this very accord into constitutional permanence, really that politically naïve as to believe that our premiers, and our Prime Minister too, would always place the good of Canada before their own professional concerns?

Indeed, in the premiers' case, their very job description tends to make this kind of altruism counterproductive. I would like to conclude this summation with the accord aspect that frightens me most profoundly. It is "foreverness." If Meech Lake is indeed ratified, then under its own provisions and unanimity, the chances of any egregious errors being modified or changed altogether will become slim to none. Never would we be able to revert from Brian Mulroney's personal vision for Canada's future.

A distinguished writer, sociologist and former federal politician once compared Canada's historical governance to the pendulum swing on a clock, always moving to and away from a strong central base. I could add that under Meech Lake's provisions, that pendulum would for ever be frozen to one side and the clock consequently would become inoperative. When a nation's synergy, its ability to be greater than the mere sum of its parts, is destroyed, then so too is the rationale for belonging to that nation.

Under Meech Lake, Canada's parts will become fixed separates, beholden to none but themselves. There will no longer exist the country of Canada, but a weak-jointed, perhaps even disjointed, amalgam of province-states. "Balkanization" is a word I am sure you have heard often enough since the Meech Lake accord was first proposed, but you will hear a great deal more of it, I can promise you, if that accord is accepted.

You will also hear a great deal less of Canada. The new sovereign states of Alberta, Quebec, British Columbia, Ontario and so on will see to that. As provincial leaders grow in power, they will take to direct meddling in what are currently



federal matters, negotiating their own private deals with other provinces, even other countries, and looking to Ottawa not for leadership but for rubber-stamp approval.

The office of the Prime Minister and our elected House of Commons will devolve into backwater positions of no more vote value in Canadian affairs than the one out of 11 that Meech Lake proposes. In the name of heaven, why the rush to approve Meech Lake?

Premier Peterson has recently declared that the consequences of amending the accord would be unbelievably serious. He does not, however, go on to define what, in his opinion, would be so serious about it.

An absence of definition is one of the most egregious errors within the accord. During these hearings, you have already heard and will continue to hear what this flagrant vagueness leaves the Canadian people open to in terms of legal and political abuses of our rights and will. Surely this alone would constitute a reservation serious enough to give our legislators pause. Surely it would be far more serious to enshrine a badly flawed accord in our Constitution than to take the time and make the effort to adjust and correct its deficiencies, to better define its terms and priorities, to obtain a real mandate from the people of this nation.

If we do in truth have up to two more years to ratify this accord, then why cannot these concerns be properly addressed? If changes are indeed warranted, why not make these changes before the damage is done? If the democratic process of change and approval means we may take up to five years, or 10, or even 15 to create an accord that truly is an accord, then is this not preferable to the slapdash and haphazard approach to which we are now being subjected?

Constitutional reform is the most serious and far-reaching initiative a nation can undertake. We must, as responsible citizens all, ensure that it is approached properly and that it at all times bears the rights and wellbeing of the people first and foremost. But if the outraged cries of myself and so many other concerned Canadians are really to be ignored, then Canada is as lost to democracy and good government, right now, as it ever would be under the Meech Lake accord.

I thank you for that. I had a couple of supplementary questions, as you see on the next page; selected questions for the committee. These are just something, if they are impertinent, you can mull over.

Neither House of Commons members nor members of this provincial Legislature are

allowed to cast a free vote on constitutional reform. Where is the democratic process guaranteed to Canadians under our Constitution?

Why were MPs allowed to vote their conscience about capital punishment, and yet not allowed to follow their conscience when it came to the equally difficult, philosophical question of how this nation is to be governed?

Why must the Constitution be amended as soon as possible, when other national debates, such as the one on abortion, have taken 20 years or more to be decided?

Why is this committee travelling to Quebec to hear the French Canadian opinion of Meech Lake? Why not ask the French Canadians of Ontario? Why is this committee scheduled to hear only those speakers brought forward by M. Bourassa, who is the accord's second biggest promoter?

Will Quebec preserve and protect its "distinct society" status to the exclusion of those rights guaranteed our citizenry in the charter and the Constitution, and in the face of the accord's own requisite that all provinces preserve Canada's linguistic duality?

Setting aside all moral and legal questions concerning the accord itself, we are left with an unhealthy picture of how it was arrived at, through backroom dealings, back scratching, power plays, tradeoffs and empty rhetoric. This may be Mr. Mulroney's brand of politics, but are we Canadians to accept it as our political blueprint for the future?

Attached, I just put in a selection of newspaper clippings that seem to reflect some of the points that I make.

I apologize for the stern tone of this. I did not know exactly what I was going to be facing with this committee. I can see now, from sitting here and listening to you, that a lot of you are very sympathetic to this, but I was not aware of that at the time. For all I knew, this could have been just a hand-picked group of people who were going to rubber-stamp approval of this. I can see now that you all have very serious concerns, as I do, and that you will try to work with those concerns. Whether it will do any good, we will all have to see. I would be glad to answer questions.

1640

**Mr. Chairman:** Thank you very much. I do not think you need to apologize for the feeling that you expressed. I think oftentimes that is important in terms of getting across, whether it is to this committee or any other body, the views that you do hold.

Just as a matter of public record, in answer to two questions which related to the committee's work or suggested perhaps things we were going to do, we are not travelling to Quebec and we have heard already from some of the franco-Ontarian organizations.

**Ms. Smith:** I was given that information by the ad hoc committee of women.

**Mr. Chairman:** We were considering doing that, but we are not. We have heard from some franco-Ontarian organizations, we will be hearing from others and we are not hearing from only those speakers brought forward by Mr. Bourassa. We have had a number of individuals and groups in Quebec who have asked to appear before us. We have tried to identify people so that we can better understand some of the depositions.

**Ms. Smith:** Again, that was information I got from the ad hoc committee. So that is all up in the air.

**Mr. Chairman:** I think as we have moved along we have developed our approach as well, but I just think I would like to clarify that.

**Mr. Breagh:** I would like to do something a little unusual. I am going to take a stab at answering some of the pretty valid questions that you have put at the back, and the chairman has answered a couple of things. As I recall what we have discussed, no one has ever really done this. I think it would be useful for people to have on the record the fact that every member of this assembly is quite free to vote any way he wants on this. It may cause him a whole lot of pain to do so.

**Ms. Smith:** That is right.

**Mr. Breagh:** I can attest to that, but there is absolutely nothing that will stop a member of the assembly from voting against his or her party's stand. I can think of two members of the committee who have done that and I suspect that it will happen again. The political judgement call will be, are you prepared to face the wrath of your peers and all of that? As one of several in here who has faced the wrath of his peers, it hurts, but it is not exactly fatal. People should know that.

There will be a lot of discussion over the next little while, I would hope, of all the ramifications of that. In large part, that is what this hearing is about. I am pleased to see that at least in Ontario, unlike some other jurisdictions, to be fair about it there is a committee process and a public hearing process at work. The questions are being asked and there is at least an opportunity for people to put on the record their concerns. Sadly, that has

not been the case in other jurisdictions and may not be in all of the legislatures across the country.

I think the last question that you have posed is, for me, the biggest one. If this process of changing the Constitution of the country is found to be acceptable by people in Canada, it will be a sad day. I can live with whatever words are put in the agreement. I can live with them mostly because I know they will all be subjected to a court and the court will say: "That is stupid. That is silly. Here is what you really meant." It will be appealed by lawyers on both sides, legislatures will appeal it, Supreme Courts will sit again.

We have just seen an example in the last little while where a court said the law of the country is silly, it does not make sense and is unconstitutional. Then the provincial premiers respond to that and the federal government responds to that. So I am not as worried as some might be about the precise wording of every single sentence in the accord. It will be subjected to a whole lot of scrutiny. I hope it gets that scrutiny before legislatures agree to it.

What concerns me more is the process. If there is a good process for constitutional change set forward out of these hearings and accepted across the country, I will be very happy. But I certainly would want the people of Canada and those in every legislature to say it is no longer acceptable in this country for 11 people to decide the future of the nation, to forbid amendment and to demand ratification within a short period of time. I start from the position that this is totally unacceptable. I hope that all of us finish with the position that it is totally unacceptable. I do not know if that was their intent. I do know they are on their own little horns of a dilemma. They may be able to cook the deal in Meech Lake, but it does have to be ratified by the various assemblies across the country.

They may put conditions on that. That is probably a more likely scenario than to throw it all out. But I think you have asked some questions that do need some answers. I think we do need to put on the record, for example, that—it is true—the Premier said: "I am going to go part way. I am going to allow a committee of the Legislature to hold hearings on the matter." He should be congratulated for that because not everybody has had the intestinal fortitude to do it. He has also, in a sense, crippled in part the work of the committee by saying he does not want to hear any amendments.

I know it does not mean that amendments cannot be put. It may mean they cannot carry. I hope it does not preclude other actions, some of



which we have sought out and which may in fact be more attractive in the end than an amendment. I am attracted to the idea of getting a court decision on the override provisions of the Charter of Rights and Freedoms over this accord. That is more attractive to me, as a practising politician, than to move an amendment which might carry in Ontario and never get carried in the rest of the assemblies for the next century. So there are other things that have to be considered here.

I thank you for asking those questions and for having the temerity to voice an opinion. If there is a fault in this country, it is that a lot of Canadians have no problem with voicing an opinion in their backyard or in the beverage room, but when there is a formal opportunity for them to put their opinion on the record, they do not seem to have the time. Maybe this will shake them up a little.

**Ms. Smith:** Could I just respond to a couple of things you said? One is that from the very week this deal came out I was against it. I listened to the media; everybody was crazy about it. I listened to politicians; they all adored it. It seemed Michael Bliss and I were the only two people in Canada who thought this was crazy. A lot of people have revised their opinion since that time. I have spent, it seems like a long time, writing letters to my MP and to Premier Peterson. I have written him four times and I have gotten one response, just a package letter about how thrilled he is with the deal and not addressing any of my specific questions.

I have written to all three federal leaders, to Premier McKenna and to newspapers. I have written to all sorts of places. Finally, this was sort of my last-ditch effort here. This is everything I feel. You guys get it. That is it. I am leaving it in your, I hope, competent hands. I fully concur with the hopes you were expressing, more so because I voted for Premier Peterson. I happened to support him at the time and I am rapidly losing all respect I have for the man, as a lot of people I know are.

One other thing I can say is that 11 men may have cooked up this deal overnight, but the people of Canada are going to have to eat the slop and it may just prove very bad for our digestion. Are there any other questions?

**Mr. Offer:** Thank you for the presentation. I would like to zero in on some of the comments you made in the presentation. On page 5, you talk about the whole question of the opt-out provision and national cost sharing, things of this nature. You probably can guess we have been dealing with that particular section in one way or another

almost from day one. I think it is important that I ask if you could expand on the reason for your concerns with respect to this particular provision because, unless I have missed it elsewhere in the presentation, you talk about its being an error. But I do not know if you go that second step and say why it is an error. I am wondering if you could just share that with us.

**Ms. Smith:** I am saying it is an error because we will not be able to get umbrella activities for the whole country. We will have each province setting its standards. I am more concerned—regardless of what Mulroney is saying, none of us here, I believe, has any great respect for the man, as far as whether what he says is true, whether we believe it and whether we trust this fellow. I think that a vast majority of the Canadian people feel the same way. Otherwise, the Angus Reid polls and the Gallups and everything else would not be showing the figures that they are.

I am concerned as a citizen and as a woman. I am concerned about things like the national day care program. I am concerned that, if Meech Lake had been in effect, we would never have had the medicare system that we have and we would never have had lots of other systems that we have now. This is not really my area of expertise. I am also taking what I have read and what I have talked to people about into consideration, so I did not broaden that.

**1650**

Obviously, from the amount of copy I have put into it, my main problem—although I have a problem with the whole thing—is the distinct society status. A lot of other people seem to feel that this is only their just due. I do not, and for the reasons I have stated. If we are going to be an equal country where everyone is equal, why are some people more equal than others? I do not think that is being anti-francophone.

I fully believe in a bilingual country, but why are we separating this? “These guys over here get all these rights and privileges, and you guys just have normal rights and privileges.” If it is not extra rights and privileges, then what is Bourassa so crazy about? Why is he so thrilled with this if it is just a little sentence that does not mean anything, which is what Mulroney is trying to say?

I think it is a very dangerous precedent to enshrine in our Constitution, a very dangerous phrase to enshrine in our Constitution and I think it is an insult to every other Canadian who does not happen to be a French person from Quebec. I am sorry. That is off the topic of your question,

but I really do not have that much more to say about that. I am just concerned.

**Mr. Offer:** I would like to go back to that, and I understand your answer with respect to the cost-sharing program. I would like to get your opinion, though, on whether it might just not be such a bad idea, with respect to the principle, if in areas of exclusive provincial jurisdiction, as this amendment to section 106A talks about, the provinces should have the opportunity to have programs that meet those national objectives, but national programs in areas of exclusive provincial jurisdiction should also be subject to, in this day and age, the very different realities in Ontario and every other province.

**Ms. Smith:** There should be that input, yes.

**Mr. Offer:** Maybe that just is not a bad idea and maybe that is what the amendment is trying to get at. You might have, and we have heard from others that they have, concerns with respect to the wording and what it really means, but in terms of the actual principle, maybe that just is not such a bad idea.

**Ms. Smith:** I can see your point and I can see that the provincial input would be very important. What I was going to say was about these areas of exclusive provincial concern. We are already broadening, under the Meech Lake accord, several areas of provincial concern. Now they are concerned with our Supreme Court; now they are concerned with our Senate. In future, we are going to have two conferences a year, onward, onward, for ever into time, and, as I say, I am concerned that federal powers are going to be eroded. They are seriously eroded under the accord in my opinion and in the opinion of others, and every year this will go on and on.

Where is federal power? Where are matters of distinct federal concern? Is not the federal government in charge of all the people in Canada? Does it not have a responsibility to the people of Canada for general standards and guarantees of life? I am concerned, yes, with the wording. I think provinces should have an input into what goes down in their own backyards. But when it is a question of, say, "Every Canadian is guaranteed these health services" or "Every Canadian is guaranteed that," and then each province gets to define what, to its mind, are going to be the special services: "This province over here will have these services" and "This province over here will have those services." The federal government is in charge of looking after the welfare of all Canadians.

If you get right down to it, if you are looking at it from a provincial point of view, the federal

government really does not have much say in our concerns other than external affairs; from what I have seen of Peterson's globetrotting, maybe not even that. I am sorry. Like I say, I voted for the guy. I really liked him. More fool I.

**Mr. Sterling:** One of the things I like about your presentation is your recognition—and I do not think I have heard it put forward, although I mentioned it in my speech in the Legislature when I was talking about the Meech Lake accord and we were debating in the Legislature to send it out to this committee—your pointing out that these constitutional conferences are going to go on and on and on.

My concern is, number one, whether that is the greatest problem we have in this country, when it is going to take us two years to resolve problems relating to a struck-down abortion law, whichever side of the issue you may be on. If that, in fact, is a provincial-federal issue, should they not be addressing that kind of issue rather than dealing with "constitutional matters"?

The second thing I am concerned about is how often these guys are going to tinker with this thing in terms of dealing with the Meech Lake accord, which I see as a definite problem. During the election—I was one of the 16 Conservatives who were elected in the September 10 election—I saw at the door, first, not enough awareness of the Meech Lake accord or concern about it; but when I did run into it, and I represent an area, the city of Kanata, which is around the Ottawa-Carleton area, it was almost all negative in terms of the Meech Lake accord.

I think it is the preoccupation we seem to be developing in this country to deal with the rules. Every time they get into it—pardon my language—they seem to screw it up more and more. They are dealing with immediate situations to try to forge what the rules of our country should be. I think it is a very, very salient point you have put here.

**Ms. Smith:** Rules are what we are really concerned with here. There are no rules for constitutional amendment. There are rules in the United States but there are no real rules here. We have just been doing it in a very slapdash way and we have been doing it with a lot of backroom dealings, which I personally do not like. We are doing it in this instance without consulting the people of Canada. They have absolutely no voice, absolutely no way of being heard, the way it has been set up. It is a stacked deck.

You are right. Not as many people are concerned with this as with free trade or with whether Canada is going to win an Olympic medal in hockey, but they should be. We all



know they should be. Those people who do care, and the people who would probably learn to care if there was a little more publicity about this, a little more public debate about it, are given no choice in the matter. If not for this matter, what would we need a national referendum for? What would be more deserving of a national referendum than a change in a Constitution which affects all of us, which is the basis of our country? We should have one.

**Mr. Sterling:** At the very least I find the process distasteful. I represent some 70,000 to 75,000 people in dealing with the legislative powers of the province, but basically, anything I have had an opportunity to say has gone for naught and will go for naught unless the Premier is willing to move off the mark.

**Ms. Smith:** That is why I said what I said at the beginning of this. All our efforts could just be totally wasted. I do not know about you, but I spent over a year working on this on and off and I know that several of you seem to be concerned. It is frustrating. It is frustrating listening to the chief—I am sorry, I do not know his name—sitting there saying, “We do all this work and we come to these conferences and we get our hopes up, and then nothing happens or we are just completely ignored.”

This is the way I feel about the people of Canada altogether, not just Indians, not just women. I could have come here as a woman and presented myself as a woman or as an English speaker or as an Ontarian or something. I am a Canadian, and I am a Canadian first, and I really resent people who are Quebecers first or Albertans first, or west coast or east coast first. I do not want to get into a nation where we are defined by our provincial status and not by our national one.

**Mr. Sterling:** In terms of the aboriginal people's concern, I sat at the constitutional table in 1984 as a minister in Mr. Davis's government and I thought that if you did not know what you were doing the best way was the cautious approach in dealing with a constitutional document. That is what makes me so aghast at this.

1700

**Ms. Smith:** Just forge ahead.

**Mr. Sterling:** I understand their complete frustration. They went through five conferences and everybody was walking very cautiously along. I thought it is best not to do anything if you do not know what you are doing. Then they come down with this, and I find it extremely unfair.

**Ms. Smith:** It is not a very pretty picture for the people of Canada. This should not be our blueprint for future constitutional reform, or for this reform for that matter.

**Mr. Sterling:** I only wish you had had the same reaction in the last election.

**Ms. Smith:** I think if it goes on this way, we will have another reaction in the other way.

**Mr. Sterling:** We received a reaction in 1985 to what Premier Davis did with regard to the separate school question. I believe that part of the reason the Conservatives got thrown out, regardless of the issue, was the process.

**Ms. Smith:** I must say something just on that, on separate schools and everything. I laboured within this presentation to tell you, to inform you, that I am not a cultural bigot. I have great respect for French Canadians as well as English Canadians. I even tried learning French. I lived in Paris for seven months and studied, and I am lousy at it now.

I really would like to see a country where one day we do really embrace these two cultures. I embrace them myself. I get annoyed with Quebec for saying, “We are unilingual, unihereditary.” I find it very prejudiced, very bigoted and a denial of Canadians' rights within Quebec. I do not like to look at what Alberta does or Manitoba does in certain instances. I think that is very important. This is not a question of bigotry; this is not a question of “I am against Quebec”; it is a question of “I am for Canada.”

**Mr. Allen:** I am glad you came and I am glad you spoke with feeling, because I think it gives me a sense that Canada matters.

**Ms. Smith:** To some people.

**Mr. Allen:** People may come and make a deliverance and it may be critical or it may not, but it is not always invested with feeling and one is not always sure just what matters. I think it is quite clear as you speak what matters to you and that certainly helps us sort out our feelings too.

I feel a little bit, as I listened to you, as if we are sort of back with Galileo trying to cope with the question as to whether the earth is the centre of the universe or not. Galileo, of course, was dumped on pretty heavily. After the judgement was made he said, “None the less, it moves.” He was right.

As one lives through these intense frustrations of constitution-making, if one sort of steps back a bit, I think one still has to say that it is not always and in all respects totally being screwed up and nobody is ever getting anything right, nothing is happening and we are not going anywhere.

If I might just comment for a moment, to take your last remarks with regard to Quebec and your sense that some developments there seem to be closing that society off from the rest of us, I think that is the sense of what you are concerned about when you use the words "distinct society." You are afraid that something good is being closed to those of us who appreciate its goodness.

**Ms. Smith:** Part of our country is being lost.

**Mr. Allen:** Yet I think you seldom find that things always move in one direction at the same time. I lived in Quebec. Like you, it mattered to me. I took my family and we lived in Quebec for a year leading up to the referendum and the middle years of the Lévesque first government. It was very exciting and helpful to me to feel the sense of a people taking hold of themselves and their own lives. Part of that, of course, was in a sense discriminating against the rest of us, but it was important that they do that in order to become themselves. Do you see what I am getting at?

**Ms. Smith:** I see what you are getting at, but I think that process has been gone through.

**Mr. Allen:** Well, yes and no. Again, if we look at what happened coincidentally with the assertion of Bill 101, there were at the same time more francophones, more Québécois, studying English than at any time in Quebec's past. At the same time as they were asserting themselves, anglophones living in Montreal at that time were telling me that the personal relationships between themselves and Quebecers were better than they had ever been in their history.

I think when one goes through these processes, one has to accept a certain degree of marching backwards and forwards as one makes progress. Do you know what I mean?

**Ms. Smith:** I do.

**Mr. Allen:** I think one ought not to be perhaps too quick in damning it out of hand.

**Ms. Smith:** You will notice in my brief I was talking about the pendulum swing of the clock. I think Meech Lake is the danger because it says, "This is the way it is for ever." We do not have the swing back and forth that you were talking about, with a strong central government or with a dialogue on Quebec.

You do not have to tell me about discrimination. I am a woman and I have experienced just what Quebecers are going through, what native Canadians are going through, what blacks and everybody else goes through. I can feel that swing of dialogue. I get so thrilled that some men seem to understand women's problems, and then

every once in a while I will run into somebody who just has not the foggiest and, moreover, does not give a damn.

I understand that Quebec has special problems, but I am saying we do not need to enshrine these words in our Constitution. This is something that is part of the living, breathing fabric of our country and we have to let it live and breathe. We cannot strangle it with words in stone: "There it is and this is the way it is going to be for all time."

I am on your side. I agree there has to be a swing back and forth. I do not think we get that in Meech Lake. Once this goes into effect, that is it. There never will be a chance for anybody to go back from what it states on Quebec or anything else. That is the way I feel.

**Mr. Allen:** I am not sure that I do agree with that. Over quite a long period in our history, we have been wrestling with how to express some of the distinctiveness of aspects of our society. One of the major problems, I submit, in our country is that we have had great trouble in finding language that does indeed express what the reality of Quebec is as an entity that is, in significant respects, different from the rest of the country; not that it is different in terms of the application of equality rights or the application of multicultural concerns and considerations, but that (a) there is something different about the history, and (b) there is something different that attaches to the language and its being a different linguistic entity.

**Ms. Smith:** I disagree with that. As I said, if Canada has two languages, two histories, we should embrace them both. We should not say that this is different, this is better, this is somehow unique; it is not.

**Mr. Allen:** But if you just simply assume that, then what you are left with is a minority-language culture in a majority-language culture, which, without certain kinds of distinctive powers and assets, is always and inherently at a disadvantage, surely. That is where, I think with all respect to Ramsay Cook, Michael Bliss, Pierre Elliott Trudeau and even perhaps Henri Bourassa and his vision of Canada, it is necessary to make some recognition in some formal way of collective and community rights as distinct from individual rights. Surely our Constitution is, in some important respects, better for having done that in the past and being able to do it in the future.

**Ms. Smith:** Let me put to you, sir, are women in this country distinct from the men? Do native Canadians not have a different language and a



totally different culture, much further separate from English and French? What about ethnic populations? What about the Portuguese community? My God, you could go and split this nation down into a small, little group—compartments, as somebody was saying today—of people and you could say, “Well, they are all special and they are all distinct,” but to say that this group of people, which is half of our nation, half of our heritage, is separate and distinct, I am sorry, I do not agree with that.

I realize they have to have a little culturing of their language, of their culture, and I think that is something we can work towards and work on with them, or let them work it out on their own, I do not know; whatever they want. But I do not see the necessity for putting something like that in our Constitution, where it leaves the rest of us in Canada and people in Quebec open for all sorts of abuses, depending on which way the legal and political system goes in the future.

There are no guarantees. Everybody comes here and says: “I think this is going to happen; I don’t think this is going to happen.” I am scared to death of what is going to happen. That is the way I feel. I am scared because, as I said, I do not trust politicians—not you—and bureaucrats to take a very altruistic view of Canada.

**Mr. Allen:** I do not trust them either, but I just would submit to you that the construction of our Constitution in the past, both in its written and unwritten form, is in fact the kind of constitution that you just described, and that is the reality of what we live with in Canada.

To take the written part of it, I think the Constitution referred to the little bill of rights in the Constitution, which includes certain special recognitions of French and English language in certain institutions. It reflects a special place native peoples have with respect to the treaties, even though they are not happy with that. It does in fact enshrine different kinds of relationships between the federal government and different

provinces because they all came into Confederation under different terms.

On the unwritten side, it does, for example, recognize special concessions made to pacifist minorities that came to Canada, such as the Mennonites, the Hutterites and so on. We have now, in the course of the Charter of Rights, said that certain things that are called multicultural rights are there. We have said that women’s rights stand equally alongside men’s rights, and that is going to call for a certain amount of identification over time because they may not always be equal or be expressed in particularly identical ways.

Is that not the nature of the society we have? Is there a problem in our political culture recognizing that?

**Ms. Smith:** I am concerned that Meech Lake creates a hierarchy of rights, that some groups are more equal than others.

**Mr. Chairman:** I think this is at the heart, root and branch of everything we are doing, but I am also mindful of the time. I think these are certainly part and parcel of what we are trying to deal with. I hope that out of coming today, it will encourage other private citizens not to tear walking in on members of the Legislature as they sit in committee. I think it is at times a problem for committees where, quite appropriately, one has representatives of different groups and organizations, but it is very important that individual citizens come forward as well.

We thank you very much for taking the time to prepare this for meeting with us today. As we work our way through this, I hope we will be able to find the right way and act not only as Ontarians but also as Canadians.

**Ms. Smith:** I hope so too. Anyway, thank you.

**Mr. Chairman:** Thank you.

The committee adjourned at 5:14 p.m.

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**From the Citizens for Public Justice:**

Carrick, Wayne, Secretary of Executive Committee, Ontario Division

Vandezande, Gerald, Public Affairs Director

Olthuis, John, Legal Adviser and Research Director



**From the Metro Action Committee on Public Violence against Women and Children:**

Marshall, Patricia, Executive Director

**Individual Presentation:**

Gillis, Deborah

**From the Voice of Women:**

Macpherson, Kay, Executive Member

Carr, Betsy, Executive Member

Gilchrist, Madeleine, Executive Member

**From the Union of Ontario Indians:**

Miskokomon, Chief R. K. (Joe), Grand Council Chief, Anishinabek Nation

**Individual Presentation:**

Smith, Leslie









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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Monday, February 22, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Monday, February 22, 1988**

The committee met at 2:03 p.m. in room 228.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Ladies and gentlemen, we will begin our afternoon session. I want to welcome Professor Stefan Dupré, professor of political science at the University of Toronto, who will be our first witness this afternoon. Professor Dupré is certainly no stranger to Ontario government affairs, having served as chairman of the Ontario Council on University Affairs, the Royal Commission on Matters of Health and Safety Arising from the Use of Asbestos in Ontario and the Ontario Task Force on Financial Institutions. I know this setting is not one that will put you ill at ease at all.

We are delighted that you could come and join us for the beginning of our third week of hearings. Everyone has a copy of the document you sent us. As I mentioned to you beforehand, I think we are fairly free in how to proceed, but if you want to provide your introduction and speak to some of the major points in the text, that would leave us a good bit of time to ask questions.

### PROFESSOR J. STEFAN DUPRÉ

**Dr. Dupré:** I am in your hands, Mr. Chairman.

May I thank you and your honourable colleagues for the opportunity to appear before you. I do so as a warm supporter of the Meech Lake-Langevin accord. In holding these hearings, this Legislative Assembly is making its own vital contribution to the most recent episode in the long Canadian saga of constitutional reform. This saga did not and could not end with the Constitution Act of 1982.

That is because the Constitution Act is considered, by the bipartisan resolution of the Quebec National Assembly, to have been imposed on Quebec without its consent. A vital part of the constitutional law of this country has therefore been deemed illegitimate by the elected representatives of our second-largest province.

To me, this is a symbolic monstrosity. Thanks to the Meech Lake-Langevin accord, the Ontario Legislature, along with the other Canadian parliamentary assemblies, has the opportunity to purge the constitutional landscape of this mon-

strosity. I urge you, and through you all your assembly colleagues, to seize this opportunity by ratifying the Meech Lake-Langevin accord.

Because I have been a student of federal-provincial fiscal arrangements for more than 30 years, I thought it might be helpful for me to lay before you a detailed analysis of section 106A of the accord, which deals with the federal spending power. That analysis is contained in the 13-page document that follows the text of my introductory remarks.

To summarize very quickly, section 106A creates a federal constitutional obligation to compensate a province which, while wishing to opt out of a future shared-cost program, is ready to mount a compatible program. In exchange for the federal obligation it creates, section 106A explicitly legitimizes federally conditioned payments to provinces in areas of exclusive provincial jurisdiction.

Viewed in this light, I submit to you that section 106A can be called a masterpiece of intergovernmental compromise. I submit as well that section 106A reduces the possibility that the federal spending power will be subject to private constitutional litigation in future and that its consequences for the conduct of fiscal relations by the duly elected federal and provincial governments of this country will be minimal.

I will elaborate at the close of these remarks, since you invited me to, Mr. Chairman. For the moment, may I ask you instead to permit me to close my introductory statement with a brief comment on the future of constitutional change in this country.

There are, as I see it, two possible scenarios. In the first scenario, the Meech Lake-Langevin accord fails to be ratified by Canada's 11 parliamentary assemblies. I submit to you that in this scenario the accord will simply have to be reinvented but, very likely, in circumstances that are far less auspicious than the present. Years, likely more than a decade, will pass during which all other items on the constitutional agenda, notably aboriginal rights, are on hold.

In the second scenario, the Meech Lake-Langevin accord becomes part of Canada's constitutional law. From this point forward we have a Constitution which is legitimate "from sea even unto sea." With the symbolic monstrosity of



Quebec's dissent removed from the Canadian landscape, it will be possible to approach the constitutional agenda with a sense of proportion and a sense of priority.

I submit to you that a sense of proportion should speak for a hard-nosed approach to the need for further constitutional amendments. Constitutional amendments are only one of a number of alternative instruments whereby we can adapt to changing circumstances. They are often, in my view, an inferior alternative because of their relative rigidity.

We should therefore be mindful that in an area such as fisheries, to take an example, nonconstitutional federal-provincial agreements are an alternative which can accomplish much, as they did in the area of offshore mineral rights. Such agreements are more easily open to renegotiation than black-letter constitutional text and therefore more adaptable to unpredictable changes in our physical, social and financial environment.

Another alternative to constitutional change is the development of rights and freedoms through the enlightened statutory enactments of each of our elected legislative assemblies and through the regulations and spending programs pursued by our responsible cabinets. It is through such instruments, sensitive to local circumstances and readily adaptable to changing needs, that the government and Legislative Assembly of this province, to their credit, are advancing minority language rights.

If a sense of proportion speaks for rationing future constitutional amendments in favour of alternative instruments that are more responsive and adaptable to change, a sense of priority with respect to the Constitution speaks for an approach to possible amendments that focuses on individual items rather than large packages and that permits detailed scrutiny of their possible implications before first ministers and their governments commit themselves to firm proposals.

**1410**

The Constitution that we have is not simply the outcome of intergovernmental bargaining. Its very language bears the unmistakable imprint of community groups which represent the people of Canada on the basis of such shared characteristics as gender, race, ethnicity and physical and mental handicaps. This constitutional language, so apparent in the Charter of Rights and Freedoms, is there because these groups were heard in the winter of 1980-81 by a joint parliamentary committee well before the No-

vember 1981 intergovernmental negotiations which yielded the Constitution Act of 1982.

In my respectful view, two pertinent observations follow. The first is that the Constitution which the Meech Lake-Langevin accord seeks to legitimize from sea to sea is well and truly a people's constitution. The second is that legislative committees such as this one have an important future role as forums in which the views of citizens and their associations can be publicly recorded and searchingly examined with respect to the possible content of future amendments that first ministers might subsequently consider. It is on the basis of occasional hearings of this kind that informed judgements concerning specific constitutional priorities might come to be formulated.

Mr. Chairman, you asked me to elaborate a little bit, as part of my opening remarks, on the longer technical analysis of section 106A that I laid before you. Let me draw your attention to the middle of page 4 of this analysis where I expressed the view that section 106A is a stunning expression of the art of compromise.

To elaborate, I note that section 106A is completely silent on the matter of federal payments to institutions which are under provincial jurisdiction. As such, section 106A recognizes the effectiveness of the political limitations on such payments in the past while, at the same time leaving their future configuration to coming generations of politicians and citizens.

If I may editorialize, I am very much of a Jeffersonian in matters of constitutional change. No generation should easily assume the task of binding future generations through overly rigid constitutional provisions. To me, section 106A in, for example, leaving the whole matter of federal payments to institutions that are under provincial jurisdiction open to the political process, leaves this important matter where it belongs, that is, with the future generations who will want to grapple with these questions.

I note further that section 106A is silent on the matter of federal payments to individuals. We have had past constitutional suggestions: the Victoria charter contained one such suggestion which flirted with constitutional limitations on the capacity of Ottawa to make payments directly to individuals in areas of provincial jurisdiction, for example, adult training allowances. Section 106A has nothing to say about such federal payments to individuals and, accordingly, the most visible and, as we know from history, politically potent manifestations of the federal spending power are left uncurbed.

As to what section 106A addresses, it does create a federal obligation towards an opted-out province rather than any kind of limitation on the application of its federal spending power, even to shared-cost programs. You search section 106A in vain, as a matter of fact, for any of the limitations on what could constitute a shared-cost program with which past products of attempts at constitutional reform sought to hedge the initiation of such programs by Ottawa.

I note finally that section 106A features a quid for the quo of the constitutional obligation it imposes on the federal government vis-à-vis an opting-out province. The explicit reference in section 106A to shared-cost programs with national objectives in areas of exclusive provincial jurisdiction is something that is new and something that shifts the legitimization of these manifestations of the federal spending power from rather obscure statements made by courts in the past to the black letters of constitutional text.

I repeat—as the language of section 106A makes clear; I refer to its opening words: “The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section.” There is the language that creates the constitutional obligation to compensate an opting-out province from a future national shared-cost program.

It is accompanied in the very same sentence with the quo that is exchanged for the quid of that obligation, namely, “in an area of exclusive provincial jurisdiction.” The sentence makes clear that the government of Canada is in line with the Constitution when it has national shared-cost programs in areas of exclusive provincial jurisdiction.

As a later page in my technical analysis points out, not the least of the advantages that I see accruing from a black-letter text recognition of the legitimacy of the federal spending power in areas of provincial jurisdiction is that private litigants—be it a medical association or any other kind of group that has its own special-interest stake in trying to curb the federal spending power—will be deterred from challenging the judgement of the elected representatives of the day by trying to trump them in court.

I can elaborate further, if you will, Mr. Chairman, but I am in your hands and in those of your colleagues.

**Mr. Chairman:** On page 11 and following in your brief, on the conduct of federal-provincial

fiscal relations, I thought there were some interesting suggestions there. I wonder if you could touch on that before we go to questions.

**Dr. Dupré:** Certainly. One observation that I make on page 11 is one I have addressed to those who do worry that section 106A might somehow or other give rise to a multitude of opting-out situations as provinces try to cash in, so to speak, on the constitutional obligation that the federal government now has to bear to compensate them for opting out. What I note in my analysis and what I telegraph in the middle of page 11 is that, of course, the constitutional obligation to an opting-out province arises only vis-à-vis a province which wishes to opt out of a matter that is indeed exclusively under provincial jurisdiction.

The point of my analysis is that federal-provincial fiscal relations as they have evolved in the last two decades normally have not involved matters that are exclusively under provincial jurisdiction. Instead, they have involved some of the so-called grey areas of the Constitution, areas where, for example, municipal affairs becomes urban planning or housing, areas where education becomes manpower training.

#### 1420

Let us take child care, which is very contemporary, as an example. Is child care a matter of exclusive provincial jurisdiction? I put it to you that it is a matter of exclusive provincial jurisdiction only if one insists that child care is, in quotes, “early childhood education,” but that child care, as we all know, can be just as easily a matter of labour-market adjustment to enable parents to participate actively in the labour force. I put it to you that child care, which is so contemporary, is a very good example of an area, actual as well as potential, of federal-provincial fiscal relations. It is very likely not an area of exclusive provincial jurisdiction. At worst, it could be an area of exclusive provincial jurisdiction only if a federal child care initiative had been deliberately framed to be that way.

In brief, given the tendency of federal-provincial fiscal relations—a tendency well documented over more than 20 years of practice—to involve areas of public policy which are the so-called grey areas of the Constitution, I do not see the existence of section 106A, assuming it were to become part of the law of the Canadian Constitution, as having any kind of an impact on the way elected politicians—I like that term precisely because it reminds us always that elected politicians are the outcome of the freely



exercised choices of future generations—conduct our federal-provincial fiscal relations.

This is why, when I was wrapping up my paper, one of the points on which I closed was that one of the great advantages I saw to section 106A in particular is that fiscal relations would remain insulated from the dead hand of any particular generation of constitution-writers, and for that matter, from the opinions of a judiciary with no particular claim to fiscal expertise or sensitivity.

**Mr. Chairman:** Thank you very much. As elected politicians, it is always nice to hear some reason why we should continue to exist over and above judges, if one is permitted to express that view.

**Dr. Dupré:** One of your greatest claims to that legitimacy, as you well know, is precisely that your tenure is temporary.

**Mr. Chairman:** Right; as we are made only too often aware. Thank you very much for elaborating on some of the points that are in the brief attached to the presentation. I know there are various other aspects which we will want to look at, if not in the discussion which will now follow, certainly when we are considering particularly section 106A. I will turn then to questions and begin with Mr. Breagh.

**Mr. Breagh:** One of the problems a lot of us have with the agreement itself is that there is no Hansard, no record of what people intended to do, no concept of what bargaining went on back and forth. It puts us at a bit of a disadvantage in that normally in an exchange by politicians, you can get a clear idea of what somebody is trying to do if you can read what the argument was. In this instance, we see only the result of the arguments.

Much of the concern that has been expressed to us is about this section 106A routine. I have to tell you that I read that, and as I read it I said, "That is describing business as usual in Canadian politics." If it has done anything any differently, it has laid down some ground rules for those who want to opt out which were not there previously. As I run over the Canadian experience, it is pretty hard to come up with something that was not done in something like that kind of formula or that milieu, whether it is policing, pensions, medicare, education, building roads or whatever.

Is there anything I am missing in this one section, because this sure has everybody rankled that this is going to balkanize Canada? I do not know what the hell is wrong with the Balkans that they are so bad and Canada is so good, but apparently this has now become an evil term, that

there will be a variety of social and educational programs from one end of the country to the other. It strikes me there now is. It strikes me we do not even build a road the same in northern Ontario as we do in the south. You cannot compare social services, education, rinks or libraries from one end of the country to the other because they do not fit. Everybody builds them according to a local standard. Is there anything I am missing in this section? What is it that is in here that has everyone so upset that awful things are going to happen?

**Dr. Dupré:** I have had to ask myself the same question, Mr. Breagh. Let me say that, like you, I have found it very hard to come up with an answer. Your own memory very correctly brings out that we have had all kinds of opting out from shared-cost programs in this country. There is a history there that goes back to the 1960s.

Let us not forget as well, if you will permit, Mr. Chairman, that we had a well-known instance of opting out of a wholly federal spending program directed to institutions. I refer of course to the university grants of the 1950s, which Quebec opted out of. This was an entirely federal program. It was not a shared-cost program. We have had opting out of entirely federal payments to individuals. That is the case of Quebec with the so-called youth allowances of the late 1960s.

Looking at it the other way around, again just to embroider on the excellence of your recollections, we have had opting in—

**Mr. Breagh:** You cannot accuse me of having a good memory; come on.

**Dr. Dupré:** We have had opting in of all kinds. For example, all provinces except Ontario and Quebec opt into police services provided by the Royal Canadian Mounted Police.

I guess the only point becomes this—I come around to an answer to the question that you so rightly pose: after I have simply considered all the kinds of opting out that have taken place and observe that every one of these situations involved a political response to a particular set of problems as they were viewed by duly elected and responsible federal and provincial officials at the time those particular arrangements were arrived at, the only thing that section 106A does is to single out a particular small area, shared-cost programs in areas of exclusive provincial jurisdiction, and say that under circumstances which I think are relatively hard to conjure, but that does not matter, there is a constitutional

obligation to compensate the opted-out province.

**1430**

I can sympathize with anyone who is a little taken aback by this simply because of my Jeffersonian bias, which always leads me to say, "Why put something down in a constitutional text rather than leave future generations completely free to play with it?" Having answered your question that way, in brief what I am saying is that if I have to regret something, I regret putting any part of this in the Constitution, including section 106A.

At this point I have to let memory speak again—I am sure yours speaks as mine does—and recall, going back to the Confederation of Tomorrow Conference which this government hosted at the Toronto-Dominion Centre in 1967, that Quebec had, as a demand on the table, limitations on the federal spending power. I look over time at the different attempts that were made to cope with this demand. They included, for example, attempts to limit the way the federal government can define the shared-cost program. You do not find that in section 106A. They included as well a limitation on federal payments to individuals. You do not find that in section 106A.

What you find in section 106A is, therefore, as my analysis concludes, a truly minimalist response to that very long-standing Quebec demand. It is certainly a minimalist response which, as a Jeffersonian, enables me to sleep quite decently. I do not think it hamstring future generations in any significant way.

**Mr. Breagh:** Let me just pursue that a bit. In today's political climate, most of what any jurisdiction wants to do infringes in some way on somebody else's. It is rare in politics today to see a nice, clean sweep where the obligation to fund, for example, is clearly on one level of government. Virtually everything we do is shared-cost and most of our traditional ways of putting it into little boxes is breaking down.

I watched Mike Dukakis defend his training program in Massachusetts over the weekend by simply saying: "We were trying to get single-parent mothers back into the work force. Nothing we could think of would work because the biggest single problem was that they had children to look after." If this was not done in conjunction with some kind of child care program it was not going to function, and if it was not done in conjunction with some kind of job placement program it would not work.

Most of what we are running into here is the same kind of thing: you cannot solve problems

any more, it seems, by just picking those that are in your jurisdiction and choosing to do that. You must decide what the problems are and then attack them no matter whose jurisdiction they are in. It seems to me that if there is something here that is different, maybe it is that there is now a ground rule, so to speak, of how you would go about determining exactly who is opting in and who is opting out. Where we used to kind of negotiate a political settlement—"Here is some money; go away"—now they say: "Here are some standards. If you meet them, fine; if you don't, you're out."

That really is the only thing in that section which I see as being substantively different from what we have done. Is there something I am missing there again?

**Dr. Dupré:** No, I do not think you are missing a thing, sir. Might I simply say, however, that while your observation is correct, it may perhaps unduly magnify, if I might say, what section 106A is really getting at. I say this because of the kind of end result of it that you outline, that there comes a point where a province has to be given money in return for meeting the program's objectives. That arises only when the subject matter of a program is indeed in an area of exclusive provincial jurisdiction. As I think you absolutely correctly put it on your way up to your description of the outcome, in this day and age the federal and provincial governments, and for that matter the municipal governments which come under provincial jurisdiction, are involved in problems and in meeting demands of the time that simply cut across these jurisdictional lines.

Governor Dukakis, when he refers very correctly to the Massachusetts problems with child care as being very intimately allied to the job opportunities of parents, is not talking about a matter of education primarily; he is talking about a matter of labour-market adjustment. Under the Canadian Constitution, there is a classic example, if ever there was one, of a grey area where both the Parliament of Canada and the legislature of a province share jurisdiction.

**Mr. Breagh:** Let me pursue one other point that is related to this. In going over why this has got so many people upset, I could not quite grasp what it was that was disturbing them, but it is certainly hitting a lot of people. Perhaps it is this, and the one area where I have a bit of concern is simply this: There may well be federal programs operating here in the city of Toronto. One that was newsworthy over the weekend again is, what do we do with parolees and halfway houses and things like that?



The federal government is a long way away from most human beings in the world, so it can sort of sit back and say, "We have to do something with these people, so we will put them in a halfway house. This gets them ready for a return to society." They are in a much better position to do a theoretical argument on this than any other level of government. Everyone else is sitting with his jaw hanging out, facing the irate citizen. At the municipal level, and to some lesser extent at the provincial level, the response is apt to be much more direct to the human need. "There is something screwed up in my community again. Why don't you guys fix it?"

Is there a temptation in this section to say that whenever the provincial governments disagree with what the federal government does, that they will in effect opt out, that they will say, "Shut down your program and we will start up our program which is better and you will have to fund it"? I can think of two or three hot political issues—the Supreme Court decision on abortion, halfway houses, things of that nature—where there is going to be a local furor.

Now the federal government is splendid in its isolation oft-times. It can kind of escape these turmoils. At the lower levels of government, you do not; you just simply cannot. Is there any concern that is valid that provinces would say: "Take your federal program to hell out of here. We will set up one which meets your standards, but we will run it much better than you do"?

**Dr. Dupré:** Yours is a multipart question, and if I may, I will give you a multipart answer. First of all, to the extent that one is looking at examples like halfway houses, what we are looking at here is the offshoot, where criminal offenders are concerned, of what is a wholly federal constitutional matter.

1440

**Mr. Breaugh:** Basically.

**Dr. Dupré:** It does not involve a shared-cost program either. But of course in something like what you mention, why not? If it is a hot issue and it happens to be one level of government that is stuck with it, there is going to be an initial response, in my experience, that not only elected officials might take from time to time, but those appointed public servants as well, of: "Go look to the other level of government. They are the ones who are causing this problem."

At this point comes a second part of my multiple response to your multiple question. Frankly having been, among other things, a provincial public servant I cannot let go by—without some qualification—your characteriza-

tion of a province as somehow or other being quite close to the grass roots, as distinct from the feds who are there in Ottawa.

I myself have not only experienced, but fought, what I have sometimes described as the Queen's Park seminar-room syndrome, whereby the view of Ontario from Queen's Park does not do credit to the enormous heterogeneity of this province and the enormously variegated needs of different communities; which needs, of course, come home to roost with the local politicians. Of course, in terms again of the particular situation that you have described, I think we are all aware that residents of so-called halfway houses are as much a product of provincial so-called deinstitutionalization policies—for example, with respect to the mentally handicapped—as they are the product of federal policies.

Of course, at this point I can readily understand why a federal official or a federal MP might say that a lot of this halfway-house problem really is the fault of those evil provinces. But at this stage of the game, I think my long, roundabout reaction to your multiple-part question brings the two of us very much on line with respect I think to the following observation: most areas of policy these days completely transcend a federal and provincial jurisdiction. They are therefore areas that involve responsibilities that are difficult for the elected or appointed officials of either level of government to escape, and certainly they do not characterize the so-called areas of exclusive provincial jurisdiction; at least with section 106A—

**Mr. Chairman:** Just as a follow-up on Mr. Breaugh's question, one of the matters that some people have raised is what is meant by "national objectives" versus "national standards" and the suggestion that there is something quite different meant by each of those. Do you subscribe to that? Do you see a problem as compatible with national objectives or compatible with national standards in terms of how that might be read by the courts?

**Dr. Dupré:** I am aware of the points that are made by those who wish to address the minutiae of the language as it is used in section 106A: what is the difference between "program" and "initiative," what is a national objective, what constitutes compatibility with the national objective?

I guess this is where my Jeffersonian bias, in part, comes home, both to make me a little critical but, at the same time, to assuage my worries. Constitution-writers, of course, conscious that what they are writing may have an impact on future generations, do indulge very

often in the temptation to think that they are writing on marble for all time and that therefore the use of a particular word, like "policy" as opposed to "program," or "initiative" as opposed to "objective," is important.

What I bring to that situation is a very healthy amount of scepticism. If you are going to write anything down in black-letter, constitutional text, what you have to admit is that the meaning of the words that you are so laboriously writing will come to be definitively interpreted over time by judges, likely by future generations of judges. It is future generations that I always feel are a little bit better, but I am still not of course altogether happy, although I am rescued by the sense of perspective that I get from the following.

If you are going to say anything in a constitution, to start off with, do not, as a contemporary constitution-writer, delude yourself with the possibility that if you had chosen one particular word or put in a particular word, the outcome might have been different. As we all know, it is undoubtedly Sir John A. Macdonald himself who learned this lesson best of all. He inserted, as we all point out when we lecture to students on the subject, the words "the regulation of trade and commerce" in section 91, being very proud of that exact use of words without any limitations, such as regulation of trade and commerce among the provinces or with foreign countries, precisely because to him in 1867 the regulation of trade and commerce unqualified meant the regulation of trade and commerce everywhere, including interprovincial commerce.

Sir John A. was still very much on the scene 14 years after 1867 when in the famous *Citizens' Insurance versus Parsons* decision, the judicial committee of the Privy Council pointed out that in its definitive interpretation, regulation of trade and commerce, notwithstanding the fact the words were there, meant regulation of trade and commerce among provinces and with foreign countries.

**Mr. Offer:** Dr. Dupré, it seems from your presentation today that you have been almost changing our focus in that those concerns that we have heard about from other persons in section 106A seem to deal with the phrase "compatible with the national objectives." I sense from your presentation that it is almost the phrase "the exclusive provincial jurisdiction," with which you are dealing in saying that in this country, at this time, very few things are or could be deemed to be of an exclusive provincial jurisdiction which would never need any federal matter. It is

interesting that in your presentation we are changing that focus—but just to share with you some of the concerns that we are hearing.

What follows from the concerns based on the focus of compatible national objectives seems to be that national programs, such as child care, could not, would not come into existence if there were a section 106A, but there would not be the political will at the federal level to institute programs which may now or may not be within an exclusive provincial jurisdiction because of the fact that the province can now, under section 106, opt out.

I am wondering if, from your experience, you can indicate or share with us some of your thoughts on that concern that has been raised.

**1450**

**Dr. Dupré:** I thank you for that question, not least because if you have been getting views that focus on other parts of the language of section 106, I have not been wasting your time by focusing on another aspect.

Let me put it to you this way. Could section 106A create a pattern of what Prime Minister Trudeau used to like to call "checkerboard federalism" in the area of child care or day care, with all kinds of provinces opting out all over the place saying, "God knows what may or may not be compatible?"

My short answer to that would be the following. If the federal government decided—and this would have to be a deliberate cabinet decision—to mount a shared-cost child care program which provided every province with half the cost of pre-school education in publicly supported elementary schools in the province, at that stage of the game, there is no doubt in my mind that the federal government would have designed a child care program which, because it focused on early childhood education, given section 93, is a matter of exclusive provincial jurisdiction and therefore of course subject to triggering the constitutional obligation to compensate any province that wishes to opt out.

Then of course, presumably, if I just let my experience in federal-provincial matters be my guide here, what would ensue, vis-à-vis the opting-out province, would be some kind of a negotiation concerning what is the equivalent of providing some places in the elementary school system for these pre-schoolers, and then you would compensate them for that.

The problem I have is—if you will pardon me for saying so, Madam Chairman—that would be a very odd way to design a child care program, because child care or day care, especially when it



is looking at pre-school children, as I understand it, would and should be designed with an eye on a wide variety of not only public but also private institutions which may or may not involve matters of provincial jurisdiction.

Let us take an area where the term "education" can arise, but where older individuals are concerned: the whole area of so-called "manpower training." Certainly we have a history of some federal-provincial disputes at which provincial ministers, provincially appointed officials—including, I might say, since I wrote a book on the subject, prominent provincial ministers and officials of this province—have, for rhetorical purposes, postured that manpower training is education and therefore under provincial jurisdiction.

When all is said and done and you examine the federal-provincial programs and relations that have been involved as ongoing enterprises, what was involved was classically a grey area of the Constitution in which, among other things, job placement and the matching of specific skills to specific employment openings—which is very much a matter of the labour market, not educational policy—were paramount.

As I would see it—and I think I see it in the kind of child care initiatives that both Ottawa and Queen's Park have been looking at—what is being examined is initiatives that cut across a wide variety of areas and cannot be pinpointed as involving an area of exclusive provincial jurisdiction, and therefore, were section 106 to become part of the law, triggering that constitutional obligation.

**Mr. Offer:** If I might continue for just one moment, I am certain from your response that given the type of programs we deal with on the provincial, federal and even the municipal level today in terms of their complexity and in terms of the elements and the factors they touch upon, the implementation of section 106A, realistically speaking, would not impact on the federal government instituting these types of national programs.

**Dr. Dupré:** That is correct. If I might just elaborate for the record, I have heard the criticism made that section 106A might impede federal-provincial development in the areas of pension, disability, no-fault insurance in the automotive realm and so on and so forth. I just do not see that possibility for the simple reason that pursuant to section 94A of the Constitution, such matters are already matters of concurrent federal-provincial jurisdiction with provincial paramountcy. So you have a quite different constitu-

tional setting that would be involved in any kind of negotiations in these policy matters, and section 106A would not apply.

**Mr. Eves:** My questioning is on a somewhat different tack. I would concur with a lot of your remarks with respect to section 106A, but we have had two groups before us, namely, as I am sure you are aware, the delegations from the Northwest Territories and the Yukon, who feel they are being somewhat prejudiced by the Meech Lake accord. Also, we have heard from numerous groups, but I suppose mostly from women's groups, concerned about whether or not the wording of the accord is going to somehow jeopardize their equality rights under the Charter of Rights and Freedoms. I just wondered what your comment was with respect to both of those matters.

**Dr. Dupré:** With respect to the two territories and their ambitions or expectations of provincial status, we have to bear in mind that prior to the Constitution Act of 1982 they had a most open road to provincial status, relatively speaking, because of course the creation of provinces out of both territories pursuant to the old Constitution Act of 1867 was exclusively a federal matter. So in terms of the legislative arenas and executive arenas that they had to convince, there was only one to get the provincial-status camel through the eye of the needle.

Now, the Constitution Act of 1982, by requiring in addition to the federal Parliament the consent of seven provinces with half of the population, certainly laid a roadblock or an added set of complications—at least seven to be specific—on the way to provincial status.

Bearing in mind, from a northern territory perspective, that the possible sources of evil in particular are the four prairie provinces, any one of which might want to expand northward—as was the case with Ontario way back at the turn of the century—the move to unanimity is seen as constituting an additional roadblock. From their perspective, I think that has to be taken as a given.

## 1500

With respect to the position that certain spokespeople for women's groups have taken, I just want to put on the record the following: With respect to the concern that arises from the fact that section 28, the equality-of-gender clause, is not mentioned in section 16, the best analyses of the subject that I have read are two, one by Professor Katharine Swinton of the University of Toronto law school and the other by Professor Donna Greschner of the University of Saskatche-

wan. Both wrote papers that were given at a U of T conference last October.

The essential point that both papers make is that the reason that section 16 of Meech Lake-Langevin mentions only sections 25, 27 and 35 out of the Constitution Act of 1982 is that these are interpretation clauses. So, of course, the "distinct society" clause, being another interpretation clause, is limited by the section 16 point that nothing in the "distinct society" clause will affect the other two interpretation sections.

The point that Professors Greschner and Swinton make is that section 28 is not an interpretation clause but a substantive rule. At this stage of the game, perhaps in the realm of constitution-writing, we are brought back to considering the irony that constitution-writers are damned when they do and damned when they do not. To have included section 28 in section 16 could have damned them for seemingly downgrading section 28 from a substantive rule to an interpretation clause. Section 28 is not mentioned in section 16, so they are damned because it is not there. Those are the perils of constitution-writing.

**Mr. Eves:** Their point being, of course, that there is opinion the other way and they are somewhat up in the air, in their minds anyway. There is some ambiguity at least, some vagueness as to what the ultimate interpretation will be.

We have heard a lot of groups, and I think I can say that probably almost ever member of the committee is somewhat concerned about the processes, about how this accord came about, how it was arrived at and when the public generally had an opportunity for input. I believe Quebec was the only legislature—there might have been one other—that held public hearings between the first draft in late April and the final draft on June 2 and 3, 1987.

Do you have any advice for us with respect to how we should approach these matters in the future? There again, as you say, I suppose you are damned if you do and damned if you do not.

**Dr. Dupré:** I guess the good news where the future is concerned is that if the Meech Lake-Langevin accord is ratified—and I emphasize "if" because I never count my constitutional chickens before they are hatched—but if the Meech Lake-Langevin accord is ratified, what I have called a symbolic monstrosity will have been removed from the constitutional landscape.

Let us not forget that Meech Lake-Langevin is the offspring of what has to be called the significant failure of 1982, whereby one of the legislatures of this country declared that the

Constitution Act of 1982 was being imposed upon it and was, therefore, illegitimate. Quite understandably, therefore, what you have had is an intergovernmental bargaining process, which I might point out distinctly follows two election campaigns—a federal 1984 election campaign and a provincial 1985 election campaign in Quebec—at which the matter of removing this so-called symbolic monstrosity was very publicly discussed and indeed put forward as a campaign promise by the two ultimately successful party leaders.

In that sense, there has been an openness but, in terms of the future, what I hold out to you in my opening remarks is what I hope might be the scenario, that constitutional changes, when they are examined, will be looked at selectively and can be subject to any of a number of open inquiries and hearings prior to being put on the negotiating table of first ministers.

**Mr. Cordiano:** I want to follow up on that with respect to the process. It is now the case that we are going to have annual conferences on the Constitution. I do not know if you are in agreement with that, but certainly that is the case. It is written right into the Meech Lake accord and, obviously, we are trying to grapple with that as a committee and as provincial legislators.

If we are going to be a part of this ongoing process, which is an evolutionary development of procedures to follow and the fact that we are going to have the annual conferences, we are trying to come up with a mechanism whereby there is an opportunity to intervene before agenda items are discussed or some other possible scenario whereby people will have input into the entire process of constitutional reform.

Do you have any specific recommendations or ideas for us as a provincial legislature, and indeed other provincial legislatures, if they are to be as involved as we are now in constitutional reform? It has been leading up to this over the years anyway, and we are getting to the process where we certainly have to play a larger role. We are trying within ourselves to come up with solutions that will enable us to participate in an efficient, effective manner with the larger public. In fact, you claim that this is a people's constitution, and we are trying to conceive of that notion in the entire reform process.

**Dr. Dupré:** I particularly appreciate your posing the question you pose to a Jeffersonian because it does force me to admit that constitutionalizing an obligation to hold conferences about a constitution is not—shall I put it this way?—the high point of the Meech Lake accord.



On the other hand, with respect to what it does to future generations, it does create an obligation that they at least talk without necessarily producing a stream of outputs that might be overly binding on future generations. One point that I take from this is that my own biases, if you want to put it that way—I can back them up with some analytical concerns that I will not bother you with—my own biases would lead me to express the hope that at least the output of such annual conferences would be very much rationed. That is number one.

Number two, with respect to the first of the two items that are named—and there are only two specific items named, aboriginal rights and fisheries—we have been obligated to hold constitutional conferences on aboriginal rights already by section 37. Where that first constitutional item is concerned, I think the message to all of us who are not the original inhabitants of this country is that we had perhaps better take that one seriously and move something.

1510

To me, that is the most important priority on the agenda of the Constitution, certainly for some period of time down the street. To the extent that the legislative assemblies of the different provinces, through their committees, provide opportunities for aboriginal and other native groups to have an input in a relatively open forum, I think this can only be advantageous. It has to be recognized that the reports of legislative committees themselves only become part of the input of the process. After all, if you are going to get down to text on aboriginals, it will be like text on Meech Lake. Somebody has to lead, and that is where we have first ministers from 11 different jurisdictions, who under our constitutional system are supposed to provide that leadership of actually getting things done.

**The Vice-Chairman:** I am sure I speak on behalf of the entire committee when I say thank you very much, Professor Dupré, for your excellent presentation today. We know it is going to be helpful to us in the next month coming up. I am sure it has taken a long time for you to come to these conclusions, and we appreciate your taking the time to come here today and express them to us personally. Thank you very much.

**Dr. Dupré:** Madam Chairman and honourable members, it has been an honour. Thank you very much for all the questions.

**The Vice-Chairman:** I believe now we have a presentation by the Canadian Multilingual Press Federation, Mr. Gregorovich and Mr. Saras. I

assume the spokesman is going to be Mr. Gregorovich. Is that correct? We would ask you just to proceed. We have received copies of your written presentation.

#### CANADIAN MULTILINGUAL PRESS FEDERATION

**Mr. Gregorovich:** Thank you very much, Madam Chairman. The brief we are presenting to you today represents the opinions of the multilingual or ethnic press of Canada, which includes the Ontario multilingual press as well. We are not speaking on behalf of the Ontario multilingual press federation; however, we are speaking on behalf of a group of publications which number something like 40 languages and something like three million readers, so it is a very highly representative group of Canadians, basically representing the heritage of about one third of all Canadians.

I am not sure whether the chair wished me to read some parts of the brief that I thought were significant or whether we should discuss in general terms, since the members of the committee have not had an opportunity to actually peruse the brief before we arrived. I am not sure what is your best—

**The Vice-Chairman:** Whatever you think is most appropriate to bring us up to speed with respect to your particular viewpoint.

**Mr. Gregorovich:** I think it would be useful then to touch on some points within the brief, and then we can go into the questions.

The federation itself requires a little bit of history. It came into being 30 years ago. In other words, we were not founded yesterday; we are 30 years old. It is the national organization representing the multilingual or ethnic press of Canada. "Ethnic" is the older and more familiar word for most people.

The federation represents and co-ordinates the provincial press associations in Quebec, Ontario, Manitoba, Alberta, British Columbia and also the Ottawa region. About 130 newspapers and magazines in 40 languages, with about three million readers, are represented by the federation. It is the publications voice of about eight million Canadians constituting about one third of the population of Canada. This third-element group comprises all those of other than British or French origin, including, for example, the Chinese, Italian, German, Greek and Ukrainian Canadians as well as our native Indian and Inuit peoples.

The main objectives of the federation are to represent and promote the interests of the

Canadian multilingual or ethnocultural press and to assist in explaining and interpreting Canadian society to multilingual readers. Another major interest is the integration of ethnic cultures into Canadian society to enrich Canada's culture and to make a reality of the official government policy of multiculturalism in Canada. The multicultural press complements the English and French press and provides all Canadians with the opportunity to celebrate and preserve their ancestral heritage through their heritage language.

I think I can proceed from that and go on to a section a little bit farther on. I thought it was significant that in the Toronto census area, which is a major portion of Ontario's population, I guess you could say, there are interesting statistics that indicate the importance of the multilingual press and the multicultural aspect of Canadian society.

In the Toronto census area, British ancestry has dropped from 1,390,005 or 48 per cent to 968,190 or 28.5 per cent between 1981 and 1986. The largest non-British groups are the Italian with 292,000, the Chinese with 126,000, the Jewish with 109,000, the South Asian with 106,000, the Portuguese with 98,000, the Black with 90,000, the German with 73,000, the French with 65,000 and the Greek with 62,000. This is a reminder of the diversity of origin in the populations of not only Toronto but also Ontario and Canada.

It is the growth of the population of the third element which has led to the growth of the multiculturalism concept which was first introduced into Parliament in a speech by Senator Paul Yuzyk in 1964. It should be noted that in comparing the mother tongue with the population by ethnic group, the former is much lower for many groups. The multilingual press in many instances is bilingual, with publications in the heritage language complemented by publications, a page or a section in English. As a result, the multilingual press reaches the immigrant as well as those Canadian-born who have less facility with their ancestral language.

For example, the Greek newspaper, *Patrides*, regularly publishes an English section. The Ukrainian community has 24 newspapers and magazines of which 14 are in Ukrainian, eight in English and two bilingual, Ukrainian and English. English-language publications of multicultural groups complement the heritage-language publications and are integral to them. This fact is essential to the understanding of the total picture presented by the ethnic press in Canada. General-

ly speaking, the longer a group has been in Canada, the higher the percentage of publications in English.

The 1987 constitutional accord, popularly known as the Meech Lake accord, has taken the constitutional development a significant step forward with the inclusion of Quebec. In a country as large and diverse as Canada, it is essential in the interest of harmony and unity that all elements of the population be included in the Constitution.

The federation believes that our Constitution must reflect the reality of Canada in 1987 when it was proposed and today, of course, 1988. Yet one out of three Canadians has been virtually excluded from the accord. These are citizens of all origins other than Anglo-Celtic or French, such as the Chinese, Italian, German, Ukrainian, Polish and Greek, as well as the native peoples, the Indian and the Inuit. These eight million Canadians have been relegated to the end of the accord in section 16, which is absolutely inadequate and ignores the reality of this nation.

All Canadians must be included in sections 1 and 2 of the accord to recognize the overwhelming multicultural fact of Canada. How can one possibly ignore eight million Canadians or one third of all Canada? Surely the recognition of the French Canadians, or Quebec, in the first section as a distinct society, actually a distinct multicultural society, does not require the relegation of other Canadians to a second-class position. The accord must be an honest statement of Canadian reality today.

## 1520

By defining Quebec as a distinct society, the accord seems to give one province special treatment which may diminish other rights guaranteed by the Canadian Charter of Rights and Freedoms. In particular, Canadian multiculturalism, which is the fundamental characteristic of our democracy and our society, as well as the rights of the native peoples and immigration matters, may be adversely affected.

It is clear that the federal government's authority will be diminished in areas such as immigration and the appointment of judges, which may create inequality in provinces across Canada. In our opinion, it would create much inconsistency and inequality if every province were allowed control over immigration policy through the creation of 11 immigration departments. We strongly believe the accord should be amended to provide for only one immigration department in Ottawa to provide a consistent



policy to benefit all Canada, and not regions or provinces separately.

Section 16: The accord is justly concerned with the protection of the two official languages, English and French, but provides inadequate protection for the original Canadian languages, the many Indian languages and Inuit, and for other-third languages which have helped build Canada. Most serious, however, is the weakness of the accord on multiculturalism. This section, with its afterthought on multiculturalism, should be completely replaced by a revised section 1 or 2 containing a strong statement on Canada's fundamental character as a multicultural society.

We hope that this select committee on constitutional reform will strongly recommend to Premier Peterson that the Meech Lake accord should not be ratified without major revisions. The future of Ontario and of Canadian society depends on equality for all citizens and this should not be sacrificed to political expediency. The province of Ontario is a major element of Canadian society and our Premier should take a leadership role in proposing corrections to the draft version of the 1987 constitutional accord.

The Canadian Multilingual Press Federation would strongly urge the government of Ontario, therefore, to reconsider the implications of the accord in relation to the native peoples and to dispersal of immigration policy. Canada needs a single, consistent immigration policy administered centrally from the federal government and not from provincial capitals. We cannot afford to permit provinces to meddle in this area, as it affects all Canada and all Canadians and not just single provinces.

The most significant flaw in the accord, we feel, is the totally inadequate expression of multiculturalism in section 16. In order to reflect the reality of Canada's multicultural character, it must be incorporated into section 2 as the fundamental basis of Canada and Canadian society within which all our, in quotes, "distinct societies" must function in equality because no Canadian should be treated as, in quotes, "more equal."

The fabric of this society is multicultural. We are a nation of many cultures and races. We believe in a just society and equality. We believe that if one community or one racial group is placed in conflict with another, we could destroy the present harmony Canada enjoys. We cannot endanger or sacrifice basic elements of our society, as in the current form of the accord which neglects to face the issue of native peoples, multiculturalism and even women's

rights adequately. We must protect the present balance of harmony for the future.

I would just like to add on my own behalf that there is a perception among many members of Parliament, MPPs and the public of Canada that the multilingual press is an immigrant press. This is true to some extent but in my own case, for example, I am a third-generation Canadian. My family was here in the 1890s. We opened up the prairies of Canada and the west. My mother was born in the Northwest Territories before there was a province of Alberta. It would now be in the province of Alberta. Our family and many families that are of this third element or multicultural dimension of Canada have contributed to the building of Canada and we are an integral part of this nation.

I think it is unfortunate that the Meech Lake accord does not give due recognition to the reality of Canada today, which includes more than the two groups which are focused on in the accord. Thank you very much.

**Mr. Breaugh:** I appreciate your remarks today because you have put in a very succinct form what a number of people are pointing out is a problem here. The argument on the other side, at least that I have heard, essentially goes something like this: When we put in the Charter of Rights, we dealt with that matter. The Meech Lake accord dealt with a different set of problems and tried to deal with that.

The problem we are having is that it depends on whom you are talking to, which constitutional expert, whether there is any impact at all or a major impact, whether the placing of words in certain sections of the act means something really bad might happen or if it is stuck in another section it does not mean anything at all. There appears to be a need to clarify the situation.

Let me ask you what I have asked a number of other groups. If we were able to determine that nothing in this Meech Lake agreement violates what was established in the Charter of Rights and Freedoms, would that go at least some measure in diminishing your concerns about this agreement? If we could kind of solve that argument, would that solve some of your problems as well?

**Mr. Gregorovich:** The great difficulty we face, of course, is the fact that the courts of Canada are going to be determining that over the next century or more. We are now laying the foundation-stones for the Canada of the next millenium, I suppose you could say. I think that if there is some way to be reassured that it does not jeopardize the Charter of Rights and Freedoms, that would certainly go some distance in

allaying the fears many members of the multicultural communities have.

The perception is that having been put into the 16th clause or section, it is a secondary part of Canada, and yet that part of Canada a century from now is going to be the majority of the population of this country. Already, it does not reflect Canada because we are approximately one third of multicultural origin, one third of British and one third of French. Already, at this point, it is obvious that it does not reflect Canada. I think that in a sense you are preserving a notion of Canada which in fact today does not exist any longer. I think this is the fear our communities have.

**Mr. Breagh:** Specifically, what a number of groups have suggested, and I am tending more and more to agree with it, is that at the very least what ought to be done here is that we ought to make a reference to the Supreme Court which says, "Is the Charter of Rights impacted by this accord at all? What is the relationship?" so that you get a nice clear decision—or as clear as you can from a court—which fundamentally would be a landmark decision.

That is what we have been told by the people who negotiated this agreement. Oddly enough, people are not taking politicians' words very readily these days. One way to get around that, or at least to attempt to address it, would be to get a reference put together and get that off to the Supreme Court. In practical terms, you could do that about as quickly as you could get any amendment through 12 legislatures of different kinds, including Ontario's. That is one thing.

The other thing I want to pursue with you just a bit, and I confess that most of us probably did not know this either, is this matter of immigration: I was unaware that eight of the 10 provinces had immigration agreements with the federal government. We are beginning now to take a look at what those entail. On the face of it, it is ridiculous to say that there would be 10 or 11 immigration policies for Canada—that would certainly be untenable—or God forbid, 11 sets of bureaucrats let loose on that.

I do not have a real problem if the agreements are relatively straightforward in nature. It seems to me from the reports we have on them so far that they do seem to be pretty logical and address the needs of particular problems. In many parts of the country there is a shortage of physicians, so it seems to me they would be very anxious to sit down and enter into an agreement with the federal government to say, "If you have a bunch

of doctors coming in, we could sure use some." Most of them seem to be of that nature.

If it turns out that our examination follows that pattern, do you still have your concern that they be allowed to enter into immigration agreements of any kind with the federal government, because that would be very hard to stop?

**Mr. Gregorovich:** No. I think the real fear is that the provinces will start creating provincial immigration policies which would affect whatever Ottawa is doing. I think any agreements with Ottawa, in themselves, would not present a problem because presumably Ottawa is going to co-ordinate whatever matters come to it from across the country relating to immigration. I think you are entirely correct on the point that there is no fear unless there is a possibility that some sort of independence of policy would be created in various provinces relating to immigration into the country.

1530

**Mr. Breagh:** Frankly, my embarrassment was I did not know that eight of 10 provinces had these agreements. On looking at them, they look relatively harmless. The Quebec one is a little more substantive than the others, but still I cannot find very much that is objectionable there. Again, it goes back to what I said earlier: If the Charter of Rights stands above this, virtually all the concerns I have dissipate. They really diminish substantially.

**Mr. Gregorovich:** Could I just add a little point to this because it is relevant here? The federal government, of course, has had agreements previously with provinces, and with Ontario in fact. I do not know the date of it but it was around 1950. The Honourable John Yaremko, who was then a member of the government here, had pushed Ottawa to allow massive immigration of Italian immigrants into Ontario. That was the source, I gather, of the Italian community in Toronto, in Ontario, basically in Canada. It was through his pressure on the federal government. I think that is certainly to our benefit and that is the kind of thing I do not have any problems with, as long as Ottawa is in charge.

**Mr. Breagh:** There are some of us who do not share your faith in Ottawa. One final point: being from Oshawa, I am a little boorish about these kinds of things. I must confess I do not get hung up about "distinct society" clauses. If somebody says to me, "Quebec is different from Ontario," I say, "Yes, so what?" I do not know if it makes people in Quebec any happier or any



different. Apparently it does. They all thought that was great.

What is there in this that makes people jittery or nervous? I take it that it is the sense, not that someone wrote the words "distinct society" into this agreement, but that later on somebody else would whip it off to court and that is where the dirty work would be done. Again, it seems to me if that old charter is clearly established as being supreme to this accord, or at least unshaken by this accord, most of you will join me in saying, "So what?" Am I correct?

**Mr. Gregorovich:** I think you are correct that we should have no fear of the words themselves, "distinct society." I think the idea of most individuals is that the implication is that if we are a distinct society, we are special, privileged. I guess the old phrase "founding nations" was used in a similar kind of concept. I think that is the danger, moving from "distinct society" to also providing privileges to a group that is a "distinct society." That is the only fear that is actually prevalent, although it is not actually spelled out that this is implied.

**Mr. Saras:** May I answer that? It is not the phrase "distinct society" itself; it is the decentralization it includes. It shows that there is a federation where the central government or the central power somehow leaves it open to this extent within Quebec. It is not only that we are concerned about a "distinct society" of francophones. The matter is what power the central agent, the central government is going to impose in order to make sure what the multilingual or multicultural communities within this "distinct society" are doing.

**Mr. Breaugh:** Let me pursue that for a minute. That is essentially one of the things I thought was a real concern, and I would like to pursue it a bit with you. I would have some concerns if I were a nonfrancophone in Quebec, that this clause by itself does not do me any harm, but if it gets into court with a subsequent government program, it may cause me some pain. It will not be the inclusion of this in the Meech Lake accord that causes me the problem initially. That is a recognition kind of thing and most of the argument is that it is in an interpretation section and all that kind of stuff, which I really do not understand.

But if I were a Ukrainian citizen in Montreal, I would be a little concerned that 10 years from now, somebody may go to court. I am arguing that I have some rights and the government in Quebec is saying, "No, you do not, and the reason you do not is that we have been called a

'distinct society' in the Canadian Constitution." Is that a summation of where your prime concern comes from?

**Mr. Saras:** I think the main objective is this one: The Prime Minister, when we brought this matter to his attention a few months ago, said, "At least, right now we have a constitutional accord. There should be more accords in the future. The Americans every year are having some changes in their Constitution," and so on. As it comes out of this accord, with the number of provinces, there should somehow be agreement in order to implement some new changes or bring in a new clause. That makes sense, but this accord is not going to be changed by any means. If the government of Quebec tomorrow abolishes every other language so there is no heritage language, nothing, nobody can do anything because it is within its own jurisdiction. Who is going to tell the government of Quebec what to do?

As Mr. Gregorovich said in his presentation, it is a matter of immigration. There are families in Quebec of Greek, Italian, Portuguese and Spanish origin, whatever. If, as a certain policy, tomorrow morning the government of Quebec decides that only francophones will enter this province, what is it going to be for those families? We are talking about unification of families and so on. What is going to be the future of these people?

**Mr. Cordiano:** Can I have a supplementary on that point? With respect to the "distinct society" clause and looking at the example that has been cited by my colleague, Mr. Breaugh, let us take it one step further in the context of what has been described by some of the legal experts who have come before our committee. They have said or hinted at the fact that what really constitutes a distinct society in Quebec is not only the French fact in Quebec, but also the other elements of Quebec society, the other ethnic groups; that in fact a distinct society like Quebec would include those other groups.

So when a court is looking at what constitutes Quebec's distinct society, it would by necessity have to include those other ethnic groups in its interpretation, and in fact section 27 of the charter would be upheld in the sense that it would have to be used as an interpretative clause, along with whatever else constitutes Quebec's distinct society. Of course, we are talking in vague terms here but certainly those elements are fundamental to Quebec's distinct society. That is some of the interpretation we have got from legal experts. Someone who lives in Quebec who is not from

the French-speaking group or the English-speaking group would also constitute part of Quebec's distinct society. What is your feeling on that?

**Mr. Gregorovich:** I think the point is interesting because what you then suggest is that we have, as the accord becomes law, groups that are the charter members of that distinct society, so if you had a new ethnic group come from somewhere in the world, it could not become a part of that distinct society. That is more or less what you are suggesting.

**Mr. Cordiano:** No.

**Mr. Gregorovich:** Those that are there now, everyone, would constitute the "distinct society," the French and all the other groups.

**Mr. Cordiano:** No. What I am saying and what has been said to us is that indeed you have more than one or two ethnic groups. Therefore, regardless of the number, you have, if you want, a pluralism of groups and a multicultural configuration in Quebec along with the rest of the country, so that section 27, referring to multiculturalism, would come into play on that kind of interpretation.

1540

**Mr. Saras:** Then why do we need that distinct society? If the face of the whole country is similar with that of Quebec, you do not need to specify only Quebec as a distinct society. Canadian society as a whole is distinct. It is a multicultural society. It is something that has been recognized, even by the Constitution in its original form. So why this change? The moment you bring Quebec as something different from the rest of the country, that means you recognize that it enjoys a special status.

**Mr. Cordiano:** It has been suggested that in fact Quebec was not recognized to this point in our Constitution and that there was no reality for Quebec in the Constitution.

**Mr. Saras:** Yes. All right. That is OK, but by the time the bureaucratic procedure is finished, it is going to be accepted as it is today on the accord.

Also, if you try to challenge those words "distinct society" in the court, it is going to be left to the interpretation of the judge and of course the judge is either going to accept whatever has been stated strictly on the accord, the letter of the clause, or is going to accept the silence of the clause. It is up to his interpretation. If the judge is going to accept that the letter of the clause means only francophones are the distinct society, who is going to challenge that interpretation? If the

judge accepts the silence of the lawmakers, he will accept that "distinct society" refers only to francophones.

Who is going to challenge that? You cannot do anything today or even in 10 or 20 years. It is the interpretation of the law. It is how the judge is going to take it.

**Mr. Cordiano:** I grant you that there is a lot of interpretation here. I am sorry, Mr. Breaugh, that this supplementary is running on but I have just one last observation here.

In fact, the very essence of the Charter of Rights necessitates that we have the highest court of the land looking at some of these issues when individuals in our society basically have conflicting viewpoints. The charter, by the fact that it is in the Constitution now, will create situations like that, because there are limitations on individuals' rights and freedoms. What you or I might consider our rights as an individual may infringe on someone else's rights and therefore we have to go to court. We have to have a Supreme Court that will somehow interpret what is a fundamental right and what is bestowed as an individual right as opposed to someone else's individual right. By necessity, we are going to have these difficulties where there is a role to be played by the judicial element of our government.

**Mr. Saras:** There are two things to consider here. When we are referring to the Constitution, we are referring to the highest law of the land. No one can challenge the Constitution unless you have a reform, a new accord later on, or you have a revolution. There is no way you can challenge the Constitution of the country in any court. You can change the Constitution in only two ways: either by sitting down and having a new accord the way this one has been placed or you have a revolution.

**Mr. Cordiano:** You do not challenge the Constitution; you challenge—

**The Vice-Chairman:** Are you finished with your supplementary?

Interjection.

**Mr. Breaugh:** Mr. Offer wants to start some trouble.

**The Vice-Chairman:** Would you please finish your questioning. There are two others before Mr. Offer has a chance to make his comments.

**Mr. Breaugh:** At the centre of the most controversial part of this is that you have to make a judgement call. Do you want Quebec to accept the Meech Lake accord and become, not in a



legal sense but I suppose in a moral, political and societal sense, part of the Canadian Constitution? Does that give you more rights and freedoms than if they are excluded? I guess that is the basic call we have to make.

I will make a comment and I would like to get just a little of your reflection on it. I would be much more worried if this were 50 years ago and you were talking about a Canadian Constitution that said the province of Quebec was a distinct society, because 50 or 100 years ago in Quebec that would really mean you were talking of Quebec being very distinctive, very Catholic, very French, very French Canadian. If I were a Ukrainian immigrant living in Montreal, I would get really worried, because you are talking about a very clearly distinct society—rigid, almost.

In modern Quebec, that is not true. I am not even sure that if you were describing modern Quebec you could use a word like "Catholic" except in the broadest and certainly nonreligious sense of the word. So Quebec is much like Ontario. There are some things that are distinctive about it. They make bagels in a different way. They have a distinctive language and culture of their own. There are people who are famous rock stars in Quebec whom we have not heard of. All kinds of things make them distinctive, but in a way which would do me harm, it is hard for me to come up with them any more.

I would like to get your reflection on that and on the judgement call. Do we opt for the accord, warts and all, if we try, for example, to establish the supremacy of the charter by means of a court reference or something like that; or is the accord a nonstarter under any conditions, for you?

**Mr. Gregorovich:** I think the accord, as I mentioned at the beginning, is a foundation-stone for the future and I would like to see it a solid foundation-stone, not a flawed one. At this point, I would like to see the correction at least to the extent that the multicultural aspect were properly recognized in it.

If that sacrifices the adherence of Quebec to the accord, I do not know. That would be like the child who cannot play with the marbles and will not let anybody else play with them, but I think this is very important for Canada as a whole and I would hope that the Quebec society would realize that this is also significant to us. It is important for them, but it is also significant for the rest of Canada. That is my own reaction to that particular aspect.

**Mr. Saras:** We do believe, as Canadians, we have one of the most modern constitutions in the

world. It is the most recent Constitution we have established and this Constitution, I do believe, is going to last at least 50 or 60 years from today. Although the Prime Minister suggested annual changes may be made, the way things are going I do not think any changes will be made for at least 50 or 60 years from today. This is going to be because of the changes in society and, later on in that period of time, whoever is in power is going to understand if the federation is still alive with this accord of a distinct society and so on. They are going to find out that it is not workable any more and then they are going to sit down and try to make changes.

Our concerns are what we are going to face over that period of 50 or 60 years, what the future of multiculturalism is. We have an act in Ottawa about multiculturalism. We do not know anything from Ontario. We did not hear anything from Quebec. Nobody knows what is going to be in British Columbia.

All those things are of main concern. There are inequalities around. You can go anywhere and you can ask anybody. If you call to complain of something to the bureaucrats, everyone depends on the written law, on our Constitution. If our Constitution excludes something specifically, nobody pays attention to you because this is out of the law. There is nothing in the law about your own rights or about your complaints, so nobody pays any attention. Everything is perfectly legal.

#### 1550

So when you are talking right now, as Mr. Gregorovich says about the fundamentals of this country, we would like to know that at least the aboriginal people of this country are happy, as well as those who are contributing and who are neither of French or English origin.

I do believe that members of my community are contributing in the building of this nation. There are senators and MPs. We do not have MPPs yet, but I hope next time we will. We want to know that our contribution is recognized as part of the mosaic and that is it. If we are going to pass this accord as it is today and we accept it, nothing can be done in the next 50 years. This is the reality as it comes out of the letter of the accord.

All the premiers can sit down every year and discuss it. Another Prime Minister of this country said a couple of years before that we were going to negotiate fisheries, human rights and so on. That simply cannot be done. It did not work in the past. It is not going to work in the future. Every one of the premiers, every time he is going to sit at the table, is going to get the best of whatever he

can from this agreement. Therefore, there is nothing that can say we will accept the accord and one year or two years later you have another change.

**Mrs. Fawcett:** I hesitate to belabour this point on distinct society, but I certainly agree with my colleague Mr. Breagh in that I see certainly the face of Quebec has changed and I cannot see it reverting. I think it will stay multicultural.

Earlier on in the hearings I asked one of the experts, and I also asked some of the others the same question privately: what if that line that Quebec is a distinct society had read, "Quebec, too, is a distinct society within the multicultural nation"?

**Mr. Saras:** Yes; this is perfectly acceptable, because it gives the exact same recognition to every province. "Quebec too." That means Ontario is a distinct society, Manitoba is a distinct society, so Quebec too is a distinct society. That makes it clear. It makes sense.

**Mrs. Fawcett:** Thank you very much.

**Mr. Elliot:** I would thank you too, Mr. Gregorovich, for your excellent presentation. We have been talking to a large number of people and your press group actually filled in the blanks with respect to the native peoples and some of the other groups that we have been talking to. There is a very consistent approach in that the present agreement or accord that has been signed is flawed and it would be preferable if it could be changed a bit before its implementation, for obvious reasons.

Up until September 10 when I came here to sit in the Legislature, I taught mathematics at the secondary school level for 28 years and I just automatically start reading figures from an analysis point of view. There are some clarification comments I would like to make with respect to the data here because, on the one hand, the one third or the eight million Canadians that you represent is a very impressive statistic and I suspect it is absolutely correct; but in the record you have given us in your presentation today, on page 2, the groups that have English or French as their mother language add up to over 21 million, or 87 per cent, which leaves just 13 per cent for all of the other groups.

Unless there has been a substantial change in those statistics since the census in 1981, jumping from that 13 per cent up to between 31 per cent and 32 per cent leaves some doubt in my mind, as a statistical sort of thing, that there is something there I do not understand. It might be the one point you made with respect to people like you and me who are third-generation and fourth-

generation Canadians who subscribe to the publications and in a census might say our mother tongue is English, but in fact it was not because of our particular backgrounds.

I would appreciate it if you would clarify those data for me so that there is some sort of reconciliation of those figures on the record, because the way I read it I think is how it would be read by other people looking at the data. That would be unfortunate, because I think you do more realistically represent close to one third of the population, not what is shown on page 2.

**Mr. Gregorovich:** This is a complication that arises from the fact that only a certain percentage of the population, which is of various origins, speaks or has spoken their mother tongue. So actually, it is exactly what you said, that the mother tongue of the bulk of the Canadian population is English and French. The eight million, of course, does represent the many groups according to their ancestry and heritage but not necessarily their facility in a third language. The mother tongue represents the language aspect, but there is the aspect of your ancestry and you do not necessarily lose your ancestry because you have lost your language. The Irish are still very Irish although they speak English. So that is really the basis.

**Mr. Breagh:** Please; I take that as a great insult.

**The Vice-Chairman:** A certain kind of English.

**Mr. Gregorovich:** I think that is what the contradiction is between the question of ancestry and the question of mother tongue. The difference is what you have noticed.

**Mr. Elliot:** That is all I wanted to clarify, because I thought if that was not written into the record—this document will be part of the record, so other people may be asking about it down the line.

**Mr. Offer:** I really had a supplementary to Mr. Breagh's question; it is just that I forgot what it was. It came out of one of your responses to a question with respect to a concern you have on account of these immigration type of agreements that might be instituted in your example, and you use Quebec.

What we are finding out is that the whole question of naturalization and aliens is a federal matter. The question of immigration is a shared matter between the federal and provincial governments. Notwithstanding the fact that it is shared, there is in the Constitution an acknowledgement that it should not be repugnant to



federal law. I think your response was dealing with the concern that you and those you represent have with respect to the particular agreements that may be negotiated between the federal government and the province.

Do you get no consolation from the fact that the Langevin agreement indicates that these agreements shall also not be repugnant to any provision of the act of Parliament of Canada or to the feds who set national standards and objectives? I am wondering why you do not say, "Yes, that is a concern"—to your mind, a valid concern—"but at least we now have in the Langevin agreement that whatever the agreements call for shall not be repugnant to federal law with respect to the setting of national standards, objectives and things of this nature."

I am wondering why you do not take some consolation to that effect, because it is not a matter of interpretation, which we were dealing with in the "distinct society" matter. This is a matter that is down and has been down for a number of years.

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**Mr. Saras:** I would like to tell you that our law is based on a tradition as it developed over the years and whatever interpretation the letter of the law prefers.

For whatever reason, because the federal government wants to have good relations with the Quebec government over a period of time or because it wants to get some sort of votes over the next 10 years, if it gives the right to the government of Quebec somehow to manage the inflow of immigration into the province, this is going to become a so-called tradition later, and I do not think that any judge will accept that this is not part of the constitutional process.

When we recognize the right of someone to do something for a period of 20 years, if after 20 years you try to challenge his right to behave that way in the courts, the courts will recognize his right to continue doing whatever he was doing over that period of 20 years when you did not say anything.

**Mr. Offer:** I understand what you are saying. This agreement does now give the right to all provinces to enter into agreements with the federal government with respect to matters of immigration. We have heard that in some way, shape or form there are such agreements already in existence. Some deal in greater complexity in others, but the fact is that for most of the provinces these agreements are now in existence.

Your concern, I must say, concerns me greatly, because I see that over all these

agreements, standing above all these agreements, is the fact that the terms of the agreement shall not be repugnant to any national standards and objectives. We are not talking about the new right of the province to enter into an agreement with the federal government, that is part of the Langevin agreement, but what we are saying is, notwithstanding that which we are talking about, that is still above everything.

The reason I want to bring that out is because of your concern that over 20 years something which is wrong becomes a right. I am saying that right from day one we have this very clear safeguard. We are not talking about something like the distinct society. We are not talking about a rights provision as opposed to an interpretative provision. It is something which we are talking about that is very clear, very much there now, very much has been there before and very much will have to be there to meet the concerns you have clearly brought forward.

**Mr. Saras:** Whatever you say here today is highly hypothetical. We try to give our best interpretation of a piece of legislation. Whatever I say represents my own views, how I interpret those clauses. I will accept your statement this way, that it is highly hypothetical. No one knows what the living conditions are going to be and what the reality is going to be in the interpretation and the implementation of those clauses. Nobody knows what Canada is going to face next year or two years from today.

We are talking about free trade. Nobody knows what free trade means, in fact. Some of us are expecting that we sell to the United States; some of us believe we buy from the United States. Life is going to show if we are right, or you are right and we are wrong. At least, right now, we do have something in front of us. We have a piece of legislation and we try to interpret those clauses and to explain to you our concerns, deliver to you our concerns. We ask you, "Please, before you go and turn that piece into a living entity of the country, take a look at this matter." You cannot ignore whatever the aboriginal people are claiming. You have to take their concerns into consideration. You have to take the Northwest Territories into consideration.

With regard to immigration, Manitoba, as Mr. Gregorovich said—as I heard at least—the original language of the province was Ukrainian; today it is English. No one in the accord refers to the fact that the first official language in Manitoba was Ukrainian because 90 per cent of the population were of Ukrainian origin. Over a period of time, the living conditions, the Canadian reality, has

silently changed this fact. Today it is English, and no one speaks about the Ukrainian language or Ukrainian rights.

**Mr. Offer:** I understand the concern you have with respect to this agreement. The point I am trying to make is that these agreements are not without limitation. Those limitations and those checks are in the agreement right now. I just wanted to try to share that with you with respect to this agreement. I do appreciate your thoughts on this.

**Mr. Saras:** As I said before, it is a matter of interpretation of the courts, because you have a Constitution which is the basic element of this state. Nobody can challenge. If it were only the national Parliament responsible—for example, I will refer to the Greek constitution. It says that by vote of three quarters of the members of Parliament they can call a new committee to amend the constitution, three quarters of the total number of the members of Parliament. Here, you do not have something like that; here you have the national Parliament, plus agreement of a certain number of premiers. Political reality proves that it is going to be very, very tough and difficult to have those changes.

The Prime Minister said a couple of months ago, when we brought those perceptions to his attention: "Why do you do that? Accept it as it is; at least we have Quebec right now; at least we have a country right now. Let's make amendments every year. Look at the United States." Yes, but the Canadian state is not the same institution as the United States. They have a different way of amending their laws, even their constitution; it is not as difficult as it proves to be here within the Meech Lake Accord.

**Mr. Cordiano:** I would like to briefly explore section 27 with you as it regards the charter. Let us look at section 27. In the light of the fact that this was part of the Constitution Act of 1982, it is in the charter. Section 27, as all legal experts have indicated, is an interpretative clause. It does not grant rights to individuals, and it says very clearly in the language used that: "This charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Assuming that, I then look at section 15, which is a rights-granting clause: "15(1) Every individual is equal" and cannot be discriminated against on the basis of "race, national or ethnic origin." That grants a right, so we are talking about discrimination.

**Mr. Saras:** Yes.

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**Mr. Cordiano:** And you use ethnicity as one of the elements on which you might consider the basis for arguing one way or the other on discrimination. I look at that and then I look at another section of the Charter which refers to the official languages of Canada, section 16, a reaffirmation of the two languages, bilingualism. So I am looking at now the Meech Lake accord and it speaks to the recognition in section 2 right off the bat, of the existence of French-speaking Canadians and English-speaking Canadians in Quebec and outside of Quebec. The language goes on to say this: "French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada."

I posed this question to other legal experts, the question about fundamental characteristic. The language implies that there are a number of fundamental characteristics in this country, and that indeed this speaks to one, a fundamental characteristic of the country, that is French speaking and English speaking, and that there are other fundamental characteristics. What this implies is that another fundamental characteristic is indeed the multicultural aspect of our country.

I see what you are saying in your brief, that you would like a very clear, unequivocal statement in section 1 or section 2 of the Constitution pointing out that Canada is indeed a multicultural society and that constitutes a fundamental characteristic of this country. I can sympathize with that.

What I am sort of baffled with and what I have to contend with, is the fact that section 16 only brings multiculturalism into the Meech Lake accord—referring back to section 27—but at the time that this Constitution Act was proclaimed in 1982, section 27, referring back to multicultural heritage, was only an interpretative clause. What I think I am hearing from you is that as an evolution from that, as an evolutionary process, that is probably not enough. Am I correct to assume that?

**Mr. Gregorovich:** Yes, I think you are absolutely correct in that.

**Mr. Cordiano:** And that you are looking for additional strengthening of that notion of multiculturalism, that—

**Mr. Saras:** Yes.

**Mr. Cordiano:** —put some teeth into it.



**Mr. Saras:** Yes.

**Mr. Cordiano:** You really have not spoken to that in here, because as we sort through all the legal opinions, this section 2 of Meech Lake is an interpretative clause with respect to distinct society. That is what legal experts are telling us. We have to sort through that maze, as I say, but if we have a number of interpretative clauses and each one of them is balancing the other, that is they are of equal status, I cannot see, for myself anyway and my personal opinion, how anything in Meech Lake would derogate from the the Charter of Rights and Freedoms in the Constitution Act. So I am left with the feeling that in fact in 1982 you were not satisfied with section 27, that section 27 in fact—and you referred to what was done in Meech Lake by section 16 as an afterthought—but it seems to me that section 27 was sort of an afterthought in the Charter of Rights and Freedoms, because it is only an interpretative clause. Somehow it does not all come together.

**Mr. Saras:** At this point, let me tell you that it was much easier for the Constitution to be amended as it was in 1982. It is much more complicated the way it comes out in the Meech Lake agreement. This is a very basic element. In 1982, everyone could expect that amendments would be done every two, three or five years, the way things were settled at that time. Accordingly, today things are much more complicated.

Another thing is you are referring to section 16 and you are referring to the Charter of Rights. If you have the Charter of Rights that guarantees the right of every Canadian, either French, English, Greek, Ukrainian, then why are you coming down to accept that the Quebec society is a “distinct society?” What is the logic behind this? If you have something, a charter, and this has been included in your constitution, the highest law of the land cannot be changed by decree of any government but only by parliamentary procedure. Why do you have to give a special status to someone who already has that status? The Charter of Rights is there. It covers the rights.

If you do that in good faith and then try to interpret this matter, if the government of Quebec has some thoughts about its own future, then why should we not have consensus about our own future, about the future of this land?

**Mr. Cordiano:** What I am trying to get at though is how this will affect individual's rights, how by saying, “Well, I will try and grapple with this”—

**Mr. Saras:** There are many ways.

**Mr. Cordiano:** —with how this will affect someone's rights as an individual. If you believe, as some witnesses have stated before us, that the Charter of Rights may be eclipsed, may be derogated from by provisions in the Meech Lake accord, well then you have an argument as far as I am concerned. But if that is not the case, say most of the legal experts who have come before us—at least in the way I am reading it to this point—they agree that the Charter of Rights is not overridden by the Meech Lake accord, that the Charter of Rights is fundamental and basic because it grants rights to individuals, whereas these clauses in the Meech Lake accord are, for the most part—many of them—interpretative clauses. Now there are changes with respect to the unanimity clauses—and you have spoken to that—changes with respect to the Senate and the judiciary. But with respect to culture, with respect to languages as contained within the Charter of Rights and Freedoms, if you are looking at that, then these rights in the charter are supreme. If you believe in that notion, if you believe that the legal experts are correct—

**Mr. Saras:** Mr. Cordiano, if you go to the St. Lawrence, you are going to find many of the businesses in the area are keeping the business in the Italian language. If you go to Danforth Avenue, you are going to find out that even some streets are carrying names with Greek letters and the Greek alphabet and Greek names. Can you show me one street in Montreal where I can see a Greek or even an English sign?

**Mr. Cordiano:** OK; that is what I am getting at. The whole language question in Quebec, I believe, is outside of this. I do not want to get into that because it complicates the kinds of things that we could—

We could possibly do that, but I will be cut off by the chair.

**The Vice-Chairman:** Very quickly.

**Mr. Breaugh:** Which would be a good idea.

**The Vice-Chairman:** Yes.

**Mr. Cordiano:** Which is probably a good idea, yes; but just a final comment. I think that you are saying that there are no language rights other than French and English. I would have to agree with you. There are none in this Constitution, in any of the changes. There is none. It is not in the Charter of Rights, it is not in the Constitution Act, and it is certainly not in the Meech Lake accord. So I would agree with you. But that is another issue that we will discuss on another day.

**Mr. Saras:** It is a matter of culture. Every culture is doing her best to retain the best. After all, this country has a culture in the making. We are making the culture. This country is even 200 years old. So we are making the culture. Every community is doing its best to give the best of its own culture in order to build Canada.

I think that under the Meech Lake accord, there are going to be some oppressed always and some of us will feel very bad.

**The Vice-Chairman:** Thank you very much gentlemen for your comments and for your excellent presentation and for your frank answers to the questions that were put to you by the members of the committee. Your comments will be taken under consideration and I am sure be thought over many times before we come to any conclusions.

Again, I wish to thank you on behalf of the committee for coming and appreciate the time and energy you spent.

**Mr. Gregorovich:** Madam Chair, I wonder if I could, on behalf of the federation, present you with the history of the Canadian Multilingual Press Federation, published in Toronto three years ago, titled Twenty Five Years of Canada Ethnic Press Federation. That was the name of the organization.

**The Vice-Chairman:** Thank you very much sir. That will be very helpful for us to review. Thank you.

This meeting stands adjourned until tomorrow morning at 10 o'clock. Room 151.

The committee adjourned at 4:21 p.m.



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### SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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Sterling, Norman W. (Carleton PC) for Mr. Harris

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**Witnesses:**

**Individual Presentation:**

Dupré, Dr. J. Stefan, Professor of Political Science, University of Toronto

**From the Canadian Multilingual Press Federation:**

Gregorovich, Andrew, President

Saras, Thomas S., Treasurer



No. C-8

# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Tuesday, February 23, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, February 23, 1988**

The committee met at 10:08 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin the Tuesday presentations, I wonder if I might ask the representatives from the Federation of Women Teachers' Associations of Ontario to come forward: Elaine Cline, president; Helen Penfold, first vice-president; and Ada Hill, executive assistant. We have received a copy of your submission for which we thank you. We appreciate your coming in this morning and meeting with us. I think I will simply turn the microphone over to you and following your presentation we will pose some questions.

### FEDERATION OF WOMEN TEACHERS' ASSOCIATIONS OF ONTARIO

**Ms. Cline:** Good morning, Mr. Chairperson and committee members. As indicated, my name is Elaine Cline and I am the president of the Federation of Women Teachers' Associations of Ontario. To my right is the first vice-president, Helen Penfold, and to my left the executive assistant, Ada Hill.

The Federation of Women Teachers' Associations of Ontario is the professional association that represents 32,000 women teachers in the public elementary schools of Ontario. In 1988, FWTAO will celebrate its 70th anniversary. This organization indeed has a proud history as an advocate for women's equality, both in education and in society as a whole. Our effectiveness has been measured federally with the campaign for the inclusion of equality rights in the Canadian Charter of Rights and Freedoms.

We appear today to make serious recommendations to this committee about amending the Meech Lake accord, despite the fact that the Premier (Mr. Peterson) has already stated publicly that he is unprepared to consider amendments. We want to go on record in support of the concept of a united Canada in which Quebec is a full participant. We do not oppose the Meech Lake accord out of bias against Quebec. However, we believe that the solution to one problem should not create others.

On the issue of women's equality rights, some of the most expert constitutional lawyers have advised us and other women's groups that the equality guarantees stated in sections 15 and 28 of the Canadian Charter of Rights and Freedoms would be affected by the "distinct society" provisions of the Meech Lake accord. At the same time, we have assurances from some politicians that this was never the intent. If this was not the intent, then we are asking that clear, unequivocal language be included in the accord to provide a legal basis to make the intent crystal clear.

Further, legal experts have differing opinions about a possible hierarchy of rights being created by the references in section 16 to multicultural and to aboriginal rights. If, as we have been assured, that is not intended, then it ought to be a simple matter to include references to sections 15 and 28 to clarify that.

We do not accept the suggestion that any amendment to the Meech Lake accord will tear it apart completely. If that were the case, why would the whole system of hearings have been set up at all? We believe this committee has a worthy and important role to play in ensuring that these hearings are meaningful and do result in changes.

In speaking to the federal and provincial powers, we join with those who are concerned about the veto power provided to the provinces and the federal government on constitutional matters. We endorse the concerns expressed by those who fear that Senate reform will be virtually impossible and sympathize with the territories' claim that their quest for provincial status has been made more difficult. We also ask the committee to recommend the deletion of the rights of the provinces to nominate senators since it is likely that such nominations could move this country towards further decentralization rather than what we see as a necessary greater cohesion.

In the area of national shared-cost programs, we are concerned about the continuation of social programs that have been the pride of this country for generations. The imprecise language found in section 7 of the accord, which does not clarify "reasonable compensation" and "exclusive provincial jurisdiction" or what "compatible with the national objectives" means, leaves us, and in



fact leaves many others, unsure of what this opting-out provision really means.

After lengthy and costly national study, we have now reached some agreement on a federal child care policy. What strength would there be to a child care program if the provinces were able to opt out? That is a question that must be asked. We must have clear language and definitions in this provision to ensure accessibility, to ensure quality and to ensure universality and comprehensiveness.

Regarding amendments, we are most concerned about the accord's outline of annual gatherings of the Prime Minister and the 10 premiers to amend the Constitution. This process, unhappily, leaves out representatives of many groups: women, native peoples and other minorities. Is it reasonable to suggest that every year our Constitution is likely to be amended? Can we expect that those 11 men will meet behind closed doors once a year and decide the fate of the entire country and then ask us what we think only after the fact? Will we be told annually that a deal has been struck which is so fragile that it cannot survive basic amendments? What a sad picture for the concerned citizens of Canada.

This process is antidemocratic. We are surprised that the average citizens of Canada are not more outraged. However, the members of this committee are not just average citizens. Therefore, we urge you to recommend amendments to the Meech Lake accord and to insist that in the future no constitutional amendment be agreed to without advance notice of what is under discussion, without opportunity for the people to be heard and certainly not without time for a thorough debate in Parliament and the provincial legislatures.

We share the desire that Quebec be a full partner in the Constitution, but we deplore the means and the process used to procure agreement. We are incensed by the absence of women in the constitution-making process. We should not be relegated to the position of petitioners after the decisions have been made. We are tired of winning battles and then having to fight them all over again when our victories are undermined by deals made when we are not there.

Finally, we do not trust the platitudinous and patronizing reassurances of politicians. We want guarantees in writing in the accord so that the rights given in the charter and elsewhere are not taken away by private deals among first ministers.

We have recommendations to put before you and I will read them.

First of all, the Constitution amendment, 1987, should be amended to guarantee equality rights, either by adding to section 16 of the Constitution amendment sections 15 and 28 of the Canadian Charter of Rights and Freedoms or by deleting section 16 and adding a clause to provide that the charter prevails over the 1987 amendment.

As a second recommendation, the Constitution amendment, 1987, should be amended to remove the vagueness and the imprecision of section 7 so that terms such as "national objectives" and "shared-cost programs" are defined and that standards are both defined and required in the shared-cost programs.

Third, the Constitution amendment, 1987, should be amended to delete the right of provinces to nominate senators so that real reform of the Senate may proceed.

Fourth, the amending formula proposed in the Constitution amendment, 1987, should be reconsidered in view of the inevitable rigidity produced by the requirement of unanimity among the federal and provincial governments.

Fifth, this committee should recommend that there be a free vote in the Ontario Legislature on the 1987 constitutional accord.

The Federation of Women Teachers' Association is pleased to have had this opportunity to speak on our concerns regarding the Meech Lake accord. We certainly welcome any questions you might have.

**Mr. Chairman:** Thank you very much for your presentation and thank you for the specific recommendations as well, which may help us to focus some of the questioning this morning. The first question, Mr. Eves.

**1020**

**Mr. Eves:** I could not have said it better myself. Many of the points your federation is making here today are points I and some of my colleagues have been making repeatedly throughout the hearings. I think a lot of them are very well and succinctly put. You are to be congratulated for putting them as succinctly as you have.

On your first recommendation with respect to equality rights and guarantee of the same, I quite agree there is at least an element of uncertainty with respect to equality rights and whether they are protected or not protected by the Meech Lake accord. I prefer personally—this idea was posed by Professor Baines when she was one of the first delegations that appeared before us—that perhaps the best way to deal with this is your second point, by deleting section 16 and adding a clause

to provide that the charter prevails over the 1987 amendment. I feel that in that way there can be no ambiguity and everybody's rights under the Charter of Rights and Freedoms are protected. Can I have your comment on that? You obviously agree with that. Would you think that is a better route to proceed than the former?

**Ms. Hill:** We have left both of the options as part of our presentation because we have heard different views from different lawyers and I am sure you have as well.

**Mr. Eves:** How they do confuse things, those lawyers.

**Ms. Hill:** One of the things we would like to be sure would happen as a result of the consideration of ensuring that women's equality rights would override any other statements in the accord would be that a very careful analysis by legal authorities be done about which of the two would be the best route.

**Mr. Eves:** Thank you. I would like you to expand, if you would, on number three. I think it is a rather novel suggestion that the right of provinces to nominate senators be deleted so that real reform of the Senate may proceed. Could somebody expound on that a little bit, please?

**Ms. Hill:** As to this comment, one of the things that is included in more detail in the brief itself on page 6 is a concern related to the fact that the balance of power between federal government and provincial government has been fluctuating back and forth over time. One of the things that some people may suspect could happen or may wonder whether it could happen would be that when provinces nominate senators, the senators thus selected would carry that particular province's point of view around issues of whether federal government powers should be enhanced or whether provincial government powers should be enhanced. That will contribute further to decentralization rather than to a more cohesive view of the country.

**Ms. Cline:** It is a shift of power that we see as not necessary. We must be seen as a more cohesive group, a nation, rather than what would be perceived not only by ourselves but also by other nations.

**Mr. Eves:** One group that I think has certainly been left out in the cold, so to speak, in this whole process is the aboriginal peoples of Canada. They were before us last week; many groups and spokespeople for them were before this committee last week. Undoubtedly, we will hear from more in the weeks to come. They were quite offended by the fact that the two items put on the

agenda for the next round of constitutional talks are Senate reform and fisheries, yet Canada's original people and their rights and their fight for self-government were not even recognized. They would be happy if they were included in those agenda items listed. I think they should be first on the agenda list. Would you agree or disagree with that?

**Ms. Cline:** I would certainly agree with that. If they are not even making it to the agenda, it speaks about where we are at in terms of their rights under the Constitution.

**Mr. Eves:** Thank you.

**Mr. Allen:** I appreciate the Federation of Women Teachers' Associations of Ontario coming before us. You are no strangers to legislative committees. I think that is fairly obvious in the way you have put your brief together and presented it with assurance and coherence of argument. It is obvious that you are wrestling with the same questions that we are wrestling with, trying to get light where there seems to be disagreement and settle our own minds as to where one goes with respect to those points where there is difficulty.

Are you concerned with respect to your first proposed recommendation that equality rights be guaranteed, that even though you might secure a charter override, the charter itself has got clauses within it which make it possible for even the equality sections to be overridden? I am thinking of section 1 which says that whatever may be "reasonable limits in a free and democratic society" may politically take precedence over the specific terms of any given item in it.

I wonder whether having just simply a statement of the charter's override of the Meech Lake accord really accomplishes your objective. Can you ever get that watertight guarantee that you appear to be looking for?

**Ms. Hill:** I think that is why we have not really come down saying one or another way to make the amendment. Section 28 of the charter is the most crucial one and it is one that we fought for along with thousands of other women in this country to ensure that it was in the original charter. It says notwithstanding anything else in this, the rights of male and female persons shall be predominant, so that there may be some merit in actually making the statement and the reference to sections 15 and 28.

**Mr. Allen:** In other words, you are not assured by those constitutional experts who say that the charter is always fully and equally present to other aspects of the constitution, whether provi-



sions passed in 1867 or provisions present or future, such as may be written or drafted by constitutional conferences.

**Ms. Hill:** I think that is what is under debate at the moment.

**Mr. Allen:** Yes. I am trying to find out whether you have come down really quite firmly and clearly in your own minds on that because that is something, obviously, the members of this committee have to come to a conclusion about after we have heard people like yourselves. It would be nice for us to get a sense as to whether people concerned about specific areas, such as you are, have come to a clear conclusion in their own minds about that kind of observation regarding the interpretation of the place of the charter.

I gather you are a bit suspicious about that. I am sort of gathering that, but I am not just sure how much that qualifies your final conclusion as to what you recommend.

**Ms. Hill:** None of us is a constitutional expert.

**Mr. Allen:** Join the crowd.

**Ms. Hill:** What we have done is to glean the advice from the experts that we have heard from, and what we understand is that there is ambiguity. Our message is that there should be no ambiguity, that whatever wording is necessary be included to make it crystal clear that equality rights that were and still are contained in section 28, particularly, of the Canadian Charter of Rights and Freedoms override anything else that may happen in the way of amendments to the Constitution.

I am sure you have heard all the discussions about the hierarchy of rights. If you say that there are particular references to multicultural rights, certain rights or the "distinct society" rights that could create a tangle of possibilities which then would need to be fought out in a court, we suggest that, for something as crucial as the charter of our country, it should be clear at the beginning, and we think that is possible.

1030

**Mr. Allen:** My sense would be that even if you said that the charter overrode, then you might still, none the less, have internal conflict between multicultural rights, aboriginal rights, women's rights and so on, simply because separate sections are all there side by side. One can as easily imagine, I would think, a conflict between multicultural rights and women's rights as one could between distinct society and multicultural rights and women's rights.

My problem is, if you simply reaffirm the charter, I am not quite clear in my own mind what has been gained. I agree that if it does not hurt anything to do so and if you have not lost anything in the process, I am not opposed to doing it. I guess I would like to be a little more certain about what was gained by accomplishing that and whether one really would overcome some of those internal problems that, I think, in our system normally get worked out over time as case by case comes before courts and one simply resolves them in practise.

Do you see the question I am posing, that the charter itself has got the same problem that you are trying to address by making the charter override?

**Ms. Hill:** A part of the problem in this circumstance is that the provisions of sections 15 and 28 have only been in place for a couple of years, so it seems a little premature to begin tinkering with those when we scarcely have any precedent cases to use as models for the influence of those two. If, as some constitutional lawyers have suggested, a hierarchy of rights is implied by picking out a few from the cluster that are stated in section 15, then it ought at least to be reasonable to say that we did not intend to do that; and as some politicians have said, "that is not binding on the courts."

What would be binding on the courts would be to say that those have not been picked out particularly but that the provisions of sections 15 and 28 are in place in this Meech Lake accord, as they have been so far in the provisions of the Charter of Rights in the Constitution.

**Mr. Allen:** I gather you are not exactly happy with the Premier's rejection of the court reference around this kind of question, as one way of resolving the problem.

**Ms. Hill:** I do not know that we would object to that kind of reference to determine the applicability. I think that kind of reference around the equality rights would only address one small part of the problem that many different groups have with the other aspects, only some of which we have addressed in this brief as well.

That would not deal with the whole issue of having Brian and the boys get together to discuss constitutional reform every year. It would not address the difficulties of the imprecise wording in section 7, so that would simply take one small part of the whole accord off to the court. Of course, that would probably leave this committee in a position of being in limbo for making its own recommendations or taking any action that this

province could take while it waited for the courts to determine that.

**Mr. Allen:** Or if the reference were framed in terms of the status of the charter vis-à-vis the rest of the Constitution; that would be the more comprehensive, would it not?

**Ms. Hill:** Yes.

**Mr. Allen:** Yes. Thank you.

**Mr. Chairman:** I have Mrs. Fawcett, Mr. Breagh and Miss Roberts.

**Mrs. Fawcett:** Thank you very much for your very fine presentation this morning. We really appreciate it. You express concern, and rightfully so, about the participation of women in the process of constitutional reform. Do you have any specific suggestions to make as to how we might rectify this? In your plan, do you have some kind of a skeleton plan as to how you would do this?

**Mrs. Penfold:** A woman Premier would help.

**Mrs. Fawcett:** I could not agree more.

**Ms. Hill:** The simple answer is yes, but I am sure that is not what you want to hear. We do have various plans in the works within our own organization related to supporting women who are interested in getting involved in the political process. However, even within the recognition that there probably will be some discussion about amendments to things as crucial as the Constitution of the country, we are suggesting in our recommendations and at the end of our brief that one of the things that should be built in is consultation prior to those discussions, that someone will notify groups across the country to say that: "The next time we get together to have a discussion amending the Constitution, we will be discussing the things that Mr. Beer has mentioned. We invite you to submit your reaction to these possibilities." That kind of discussion should happen at the front end of the process rather than after the fact.

**Mrs. Fawcett:** Such as we are doing now. This is sort of the cart before the horse; OK.

**Ms. Cline:** Right. And that women are just not placed in a role of reaction—a reactionary process—but, rather, initiating more than we have been invited to do in the past; and are willing to do I must say.

**Mr. Breagh:** A quick question on process. Many of us think this process stinks and that we have been put in a totally untenable position; that there is no good way to cut. For example, it appears there may be the opportunity to sort out who is right, who is wrong, about the charter

argument. Does the charter have an impact on this? Does this impact on the charter? That can be done by a court reference. The Premier this morning does not seem too thrilled about that idea, but someone is going to put that in front of the court. It is going to go there one way or another. The question is how quickly will it go there and how will it be framed. So that decision is going to happen one way or another.

The two entities in the country—the Northwest Territories and the Yukon—have already got a challenge going about the process and whether this was legal or not. We are not supposed to entertain amendments, says the Premier. Everybody across the country in every legislative chamber is supposed to accept this holus-bolus. A process is set up so that, theoretically anyway, every year the Constitution of Canada would be amended, and every year all of the legislative assemblies across the country would say, "Yes, great idea." If we do not get the thing straightened around, in about three years time, this country is going to be in one holy hell of a mess. From one end of the country to the other, no one will understand what is the Constitution, what is the law or who has what rights. And the lawyers, bless their little souls, will be immensely wealthy because they will be arguing all of these cases. I would like to hear a little bit more from you about the process.

The reason I want to egg you on a bit is because you did not do very much in your recommendations about process, although I noted that you expressed your dislike for the current process.

**Ms. Cline:** The last recommendation itself certainly is something I think deserves serious attention. To eliminate some of your concerns and give you a free voice and all others who have this kind of feeling, that there be a free vote in the Ontario Legislature on this issue. So that is one area that—

**Mr. Breagh:** Yes, but that is like letting me play hockey with Wayne Gretzky. I can do it, but it is not going to be a terribly successful venture.

**Ms. Cline:** Well, he is not doing too well right now anyway.

**Mr. Breagh:** I will hobble to the bank with him any day of the week.

**Mr. Chairman:** Everything is relative.

**Ms. Hill:** I would just like to comment on the process of amendment. I wonder, as I am sure many of us do, why the whole concept of annual meetings to tinker with the Constitution was ever thought of in the first place. There are constitutions in place around this world that have only



been amended two or three times in the history of their existence. So it seems to me that one of the things that could be explored by this committee and by other groups would be to say that the Constitution would be amended when it clearly needed to be amended—when there was an overwhelming groundswell of legal opinion and political pressure and thorough knowledge that there was something drastically wrong with it. That would be a time for some kind of massive gathering of knowledgeable people to say how shall we fix this egregious problem.

Not that we would all gather together, or that they would gather together every once in a while and ask, "What shall we do with it this year?" That does not strike me as a very sensible way to deal with the legislation, or the law, that covers everyone's life in this country. It took us a long time to get it. I would appeal to the members of this committee and anyone else who is concerned about the issue to say do not have annual constitutional conferences. That might be a very simple solution.

**1040**

**Miss Roberts:** If I might just address that last statement made on behalf of the presenters. That might be a problem that is inherent in the Charter of Rights and Freedoms itself. It might be that we have been too specific in the Charter. Most of the constitutions are very general constitutions and have platitudes that are spoken of, and when we did the charter in 1982 we may have been way too specific on many things and, as a result, we got together and said that some changes have to be made.

I can see that a constitutional conference each year is going to be a great hindrance, or may be a great hindrance, but I do not expect that each year there is going to be a change suggested in the Constitution.

Why we are here today is to find out, for one thing, what process we can put in place so that when they do go on a yearly basis we have had some input into what they are going to discuss, and some input into what should be discussed in the future as to what our concerns are.

You mentioned some things, such as opportunity for discussion, people to get together, legislative committees, but there has to be a more direct process put in place. What I would very briefly like to ask you, as the last two speakers have, is do you have any process that you think is going to work? Have you thought that far down the road other than you making presentations to various groups? What process can we put in place that is going to be helpful when you know we

have three months to do this, or seven months to do that? Have you thought about that? If you are going to make constitutional conferences work there has to be good structure in them. I think that might be something we should be putting our minds to. Have you thought about that?

**Ms. Hill:** We thought about that. We do not have any conclusion on it, but if you would be interested in the follow-up material to this committee after we have consulted with advisers and explored the topic pretty thoroughly we may be able to give you our opinion on a suggested outline.

**Miss Roberts:** We cannot just say that the process that we went through is wrong; because everyone agrees on that. We all agree that the process we went through is flawed, but what process are we going to put in its place? Are we going to go through a constitutional conference every year, as you have indicated, with Brian and the boys? It may be with someone else and the girls; and that is just as bad, to have someone else and the girls there. It does not make any difference whether it is all men or all girls, the process itself is wrong. I really would like to hear the comments if it takes further time.

**Ms. Hill:** The basic elements are included in our report at the top of page 10. However those end up looking in detail, those are the things that would be the framework for what we would be expecting.

First of all, there would be prior notice about what is under discussion and what sort of amendment is under consideration. There would be notification to all and any citizens of the country. There would be a series of activities put into place so that hearings would occur at the front end of the endeavour. There would be informed hearings with people who could advise and assist along the way. Then there would be a thorough and open debate in parliament and in each of the Legislatures. So however that may look on a refined basis those three elements have already been included in the brief.

**Mr. Chairman:** Thank you very much for joining us this morning and setting out your views. I should note that it is hard to try to think out a process in detail that can avoid all the kinds of potential pitfalls. This, I believe, is the first legislative committee that has been looking at that particular issue. While we have the Meech Lake accord, which we must examine and report back to the Legislature on, it is the first order of business, we have been struck, not only individually but with each group that has come before us, in terms of just how the process has failed us.

I think Mr. Breaugh has made the argument on a number of occasions that one of the problems with the accord, apart from whatever is in the accord, is the way in which it was arrived at, which tends to engender the feeling as to what sorts of things were going on, or what deals, if any, were being made. It may be that nothing in particular happened; it was just late at night or early in the morning and everybody was somewhat asleep. But it certainly focuses on that.

We thank you very much for the recommendations. Certainly those touch on items that others have raised, and I am sure others who follow will raise. But it is very helpful to have those in such a specific format. Thank you for coming.

**Ms. Cline:** Thank you, once again, for giving us this opportunity to dialogue with you as well as to make our presentation.

**Mr. Chairman:** I will call upon the representatives of the Persons United for Self-Help in Ontario, Cathy McPherson, the provincial coordinator, and John Southern, a member of the organization.

Just while you are getting seated, the Coalition of Provincial Organizations of the Handicapped has circulated to us the presentation that was made to the special joint committee. I understand that you have a brief which will be coming to us, and we will take this as background reference.

Please feel free to proceed with the remarks that you have. At the conclusion, we will ask questions on that, but this will be very valuable to us as well. If I have missed someone—and I think I must have because I named two people and there are three—perhaps you would be good enough to introduce the other person.

#### PERSONS UNITED FOR SELF-HELP IN ONTARIO

**Ms. McPherson:** We are fortunate to have Harry Beatty here, who is a staff person at the Advocacy Resource Centre for the Handicapped and who is acting as our legal counsel. However, I should stress that this is our position paper and our presentation, ARCH are merely our legal counsel.

**Mr. Chairman:** Fine. Please proceed.

**Ms. McPherson:** I do have a corrected version of this presentation if you want it. I do have some information sheets on our organization. If people are not familiar with us, we are the Ontario affiliate to COPOH, which is why we are using its position paper. COPOH is the Coalition of Provincial Organizations of the Handicapped, and most of the provinces in Canada belong to that as well as a number of associate members,

such as the association of the deaf and that kind of thing.

I would like to start by saying how pleased we are to have the opportunity to present our comments on the 1987 constitutional amendment, especially as it promises to have such a tremendous impact on the lives of persons with disabilities in Canada in the next few years.

As many of the other presenters have indicated, however, we are deeply concerned that the Premier (Mr. Peterson) does not believe that the accord should be altered in any way. It is our belief that if the language of the accord remains the same as it does now, many of the gains in equality and self-determination that disabled people have fought for in the last few years will be wiped out. If this government is sincere in its support of the proclamation of the Decade of the Disabled, we hope it will reconsider its position before these hearings have ended.

That being said, you have copies of the presentation of COPOH and I will be referring to that throughout this presentation.

First, I would like to say we are pleased that Quebec was reintegrated into the Canadian constitutional framework. We recognize the special status of Quebec within Canadian society and nothing in our presentation is meant to detract from that special status.

We have three major concerns with the constitutional amendments as they are presently drafted. One has to do with equality rights of persons with disabilities under this accord; another has to do with the spending powers as outlined in this document; and the third has to do with the process of amending or changing the accord to meet changing needs in our country.

Persons with disabilities fought long and hard to be included under section 15 of the Charter of Rights and Freedoms. We won that right over the advice of many legal experts who would have denied us the fundamental right to equality in this country. Through the equality guarantees in the charter and other initiatives we are slowing creating change in this country that will improve the lives of persons with disabilities.

#### 1050

The wording in section 16 of the accord threatens to put an end to all of this by stating that multicultural and aboriginal rights will not be affected by section 2 provisions. By singling out these two groups and not mentioning other groups covered under the charter in this provision, such as persons with disabilities, a legal argument could be made that other individual



rights guaranteed by the charter, including equality rights, could be affected by the accord.

This wording has the potential of encouraging the development of a two-tiered system of rights in this country under the charter, which was never intended when the charter was originally established. COPOH has urged the federal government to consider making the following amendments:

"(25) Nothing in the Constitution of Canada abrogates or derogates from the rights and freedoms in the Canadian Charter of Rights and Freedoms."

and

"(16) Nothing in the Constitution of Canada will abrogate or derogate from section 35 of the Constitution Act, 1982 or clause 24 of section 91 of the Constitution Act, 1867."

We urge you to affirm your commitment to the equality rights of persons with disabilities in this country by adopting these changes.

Our second area of concern lies with the description of spending powers as outlined in section 7 of the accord.

Many of you are probably aware that roughly 50 per cent of people on family benefits or welfare in this province are persons with disabilities, and I understand that is a low estimate. Not surprisingly, close to 50 per cent of persons with disabilities are illiterate and an estimated 50 per cent to 80 per cent of persons with disabilities are unemployed or underemployed.

We are talking about a very vulnerable, impoverished population that depends on health care and social assistance programs in this country to ensure their survival and equal participation in our society. On a national and provincial basis, we are struggling to work with federal and provincial governments to create new programs that better reflect the needs of persons with disabilities.

We are deeply concerned that the wording in section 7 of the accord will create insurmountable barriers to any new initiatives being established, especially the development of universal programs, for instance, in areas of assistive devices or attendant care/support services; and ensuring consistency in programs for persons with disabilities from province to province, as well as lowering the standards of present health care and social service programs, which persons with disabilities are so dependent upon.

We are particularly concerned about the wording of this section in the following areas.

The first area we are concerned about is the term "national objectives." How are "national objectives" defined and what is their scope? A clear definition of what this term means is essential to establishing policy goals and future social programs.

COPOH suggests in its paper that an interpretation of "national objectives" be included in this section with the minimum basic elements: (1) public administration on a nonprofit basis; (2) comprehensiveness; (3) universality; (4) portability; (5) accessibility; (6) provision of information on the operating of the program; and that the federal government, in consultation with the provinces and interest groups, have the responsibility of defining "national objectives" in further detail for each program.

"Compatible" is another term in this section which is too vague for our group. Enabling language must be included in clause 7 of this section to allow for federal government program criteria or conditions which will provide for a high minimum level of services, a monitoring mechanism and a system of redress for noncompliance.

There are already breaches of national standards going on across this country and the federal government has been legally challenged over its ability to enforce national standards. If we want to see persons with disabilities get the programs they deserve, the federal government must have the ability to ensure high minimum levels of services through a system of monitoring for compliance with program objectives and conditions and a mechanism for redress for noncompliance, specifically provided for in the Constitution.

I would like to point out an example of this that we heard about, which was happening in Alberta, where a school board ran out of money and simply cut back buses to get disabled people to school. This is the kind of thing that is really repugnant to our group. It is just criminal to see that kind of thing happening. It is the very thing we want to ensure does not happen.

Finally, the use of the word "initiative" in this section is extremely troubling to us. As the Canadian Council on Social Development points out:

"The problem presented by this phrase is whether the word 'initiative' includes policy instruments which lack continuing public sector involvement... 'Initiated' suggests that provinces may pursue policies through means other than programs and, so long as those initiatives meet

the objectives of the national shared-cost program, federal funding will be available.

"The normal way in which policy initiatives are pursued short of programs is through some tampering with fiscal powers in order to induce private actors to act in the manner constant with the policy. For instance, a government...may well pursue its concerns for preschool child care through encouraging a number of private initiatives. It may choose to encourage post-secondary school students to enter community college programs in early childhood care and in this way create a glut of available early child care workers who would in turn drive down the labour costs of day care. Alternatively, it may wish to reward families in which one of the parents stays at home to look after the children of the family. Or it may wish in some way to reward entrepreneurs who establish private day care facilities.

"It could be that none of the policies would satisfy the desired standards of the shared-cost program, yet they should be policy initiatives that could be compatible with the objectives behind the federal program. Provinces adopting these strategies would, therefore, qualify for federal compensation...The use of the word 'initiative' suggests that instruments which are quite diverse will qualify under section 106A and this leads us to conclude that the concept of objectives could not be too stringently interpreted, or else the decision to let provincial 'initiatives' qualify for compensation would be rendered pointless."

COPOH suggests in its paper:

"The spectre of a patchwork of social programs, which do not really address the true problems, looms before us. It is not too difficult to envision a similar scenario for self-managed attendant care, which is very important to disabled people. For example, the federal level may seek to encourage through a shared-cost program the provision of transfer payments to disabled people for self-managed attendant care to foster independent living in Canada.

"A province may seek and qualify for compensation because it has initiated a program of support for relatives who provide care to disabled adult family members. Though people are receiving care, the fundamental objective of self-managed attendant care has been missed—the control of resources being invested in the individual and the resulting increased independence and personal empowerment which comes with this. The provincial solution stimulates the provision of care but maintains patterns of dependency and paternalism...Initiatives could

be accomplished through grants to the private sector, provincial incentives to 'induce' the private sector to initiate certain practices or contracts of service. It is by no means clear that these types of 'initiatives' will be subject to charter review."

Although PUSH does not have an official position on the free trade agreement, we note that the present wording of schedules 1 and 2 of the free trade agreement which allows for contracting of social services to the private sector to manage hospitals, nursing homes and homes for the disabled would appear to reinforce our fears in this area.

### 1100

We recommend that the following changes be made to this section, along with the ones previously mentioned:

That the words "or initiatives" be deleted from subsection 106A(1) in section 7 of the accord.

That section 7 be amended to include the following clause:

"106A(3) The Charter of Rights and Freedoms applies in respect of any national shared-cost program that is established by the Parliament or the government of Canada and to programs or initiatives established by the Legislature or government of a province seeking compensation from the government of Canada pursuant to this section."

That section 7 of the 1987 constitutional accord be amended to ensure that it contains wording that clearly permits the federal government to attach conditions which will entitle Canadians to comparable access to and quality of services established by national shared-cost programs.

This last recommendation is of vital importance as these conditions play a large part in bringing about some measure of national standards in Canada. For example, Canada assistance plan payments are conditional upon provincial social service systems having appeal procedures and no residency requirements, among other things.

John, you wanted to add something to this section.

**Mr. Southern:** I do not know about add, but I certainly would like to reaffirm some of what you have been saying. As a disabled person, the privatization issue is certainly a real concern. As Cathy said in regard to the profit motive, if somebody is not making enough profit in a home for the disabled or a hospital, what is cut back on? They cut back on services to the people they are



serving. That is the only way they can keep up their profit levels. Service goes down.

It has been a real concern of mine, even without the Meech Lake accord, that this is starting to creep into our society. The growth of private health plans is a real problem. Certainly the possible erosion of social assistance is a real concern of mine. I can see it taking place because there are no real national standards.

**Ms. McPherson:** The final point we would like to make is on the amending formula. Our Constitution must be able to reflect changes in our society. By insisting that the provinces agree to change with, I believe, a two-thirds majority, our current system will become fossilized. It is already almost impossible to make changes with the present amending formula. We have heard that although hearings are being held here into constitutional reform, the provincial and federal governments have no intention of changing a word of the accord.

Groups such as ours, representing people who have been traditionally left out of the consultation processes, must be allowed to have a chance to have input into the policies and planning in this country, especially where it will have an impact on our lives.

Many of you have indicated your willingness to assist the disabled both publicly and privately. By accepting our modest suggestions for change, you can do something concrete to ensure that people with disabilities maintain their equality rights and the services they will be dependent upon in the future.

Maybe you have questions on our presentation. I know it sounds like you have been through a lot of this before, but we provide our own views.

**Mr. Chairman:** Thank you very much. We do have a copy of your presentation. I want to thank you as well for setting out the recommendations, which certainly help in focusing on some of the points you did raise. I will move directly to questions.

**Mr. Breagh:** Much of what you seem to assume—and a number of other groups share this—is that the federal government of Canada will set good standards, will set good programs. I have to tell you that my experience in Canadian politics is exactly the opposite. The federal government is about the most useless group to try to deal with.

They are a long way away, for one thing. For example, we were trying to get some transportation for disabled people in my own community. The federal government is in Ottawa. They have

no time for my people in Oshawa. They did not do very much for us. They did not set any standards or give us any money. We did that locally and provincially with the politicians we could get at.

By and large, theoretically, I accept the argument that the federal government should have prime responsibility in this area, essentially because it has the financial resources to do it. The problem I have in searching through this is that I cannot come up with any logical reason why the federal government would be any better at this than the province. My experience in politics tells me that they are not, that we certainly now have a federal government which believes very strongly in privatization, which believes very strongly that many of the programs I would advocate are of secondary interest to it, so it is not its top priority.

I am wondering what is so wrong with having a province like Ontario establish a program which may be better than a federal program. A number of our provinces have done this. I would like to get some sense from you why you believe in the supremacy of the federal government in taking these initiatives when its track record, frankly, is not that good. I am reminded that medicare was first put in place by a provincial government, not by a national government.

**Ms. McPherson:** I think we would all agree that there are a lot of national programs that are flawed and we are working with the federal and provincial governments to change those flaws. By suggesting minimum standards be established, we are certainly not suggesting provinces not do better. We are not suggesting provinces not go beyond that. There is no reason provinces should not go beyond minimum standards.

The problem, when you look at things from a province-by-province perspective, is that in a province like Ontario we are richer than other provinces. I guess, as disabled people who are part of a national movement of disabled people, we see people in poorer provinces getting the short end of the stick. There is the situation with the school buses. There are many examples all across the country where people are really getting very poor treatment. The idea of having national standards is to ensure that people across the country who are disabled get at least a minimum standard from those services.

I think it is great that some provinces have established better programs. We know that some of those programs exist. In fact, there are a number of provinces poorer than Ontario that established assistive devices programs for all

their citizens long before Ontario did, and that is a good example. Those are our concerns and that is the reason we are making that particular recommendation. We want to see disabled people get a fair deal across the country, not just in the richer provinces.

**Mr. Breagh:** OK; I think I understand where you are coming from, but to use the example I did before, the poorest province in Canada, Saskatchewan, implemented medicare before the federal government was prepared to do it. I am not convinced it is the level of government that is the key factor here. Perhaps we can point to another area I used as an example, transportation for people who have some kind of disability. If you live in Toronto, you could argue that the system of transportation for disabled people in the city of Toronto is not very good, but if you live in Tweed or Marmora, you would say the system does not exist.

Is it your argument that there should be a national standard everybody has to meet that is clear, defined, regulated and all of that? If that is the basis of your argument, I do not have any problem with it. But I remind you that history often tells us that it was not the federal government which took the initiative and I do not want to shut down the option of a province, however poor it might be, deciding, "We ought to do a better job at this than the federal government requires us to do."

**Ms. McPherson:** In our presentation, I think we talk about the need to have compliance and to ensure that provinces meet a certain standard, but we are not saying that provinces should not have the opportunity to go one better than the standards. We are not saying that people should not have the initiative to do it. Certainly under the Canada assistance plan legislation right now, provinces can take initiative and have taken initiative and we want to increase those abilities for them to do it.

I do not know. This is the stand we have taken and I guess we have taken it because we want to make sure—the other issue, which we have not really addressed in this particular presentation, is portability. A lot of disabled people may want to move from one province to the next and we want to be assured that the services in different provinces are similar or that they are getting a similar level of services. Portability is also important to our people, especially when you are thinking of attendant care, for instance. If we are changing the whole attendant care program, then portability is very important. That is another reason national standards are important to us.

1110

**Mr. Breagh:** Where I would agree with you is in terms of an individual's right to have some kind of program. That is where I would put the emphasis. I would put less of an emphasis on those parts that deal with programs and how you operate the programs because I think history tells us that many of our provinces disgrace the federal government in terms of being able to outperform national standards. They do much better.

As to our success ratio, my judgement would be that whenever the national government of Canada sets out to put down standards, for many people they become the absolute. That is where they are at and they never go beyond it. That is my reluctance in terms of nursing homes, hospitals and things like that. Care of the elderly, for example, is a place where minimum standards were put down and when the private sector moves in there, it takes those minimum standards and makes them maximum standards. That is a problem I have with that just general approach to providing some kind of service.

**Ms. McPherson:** But are you not talking about a problem of compliance where people are not being punished? I think that is the issue at hand there, not the fact that the federal government has guidelines. It is the fact that there does not seem to be any teeth in making sure people live up to those guidelines.

**Mr. Breagh:** Exactly. Our success ratio in terms of compliance with those standards stinks. We have been at it for a long time so I am saying let us get off that one and try another track just to see if we can do it in a better way.

**Mr. Eves:** I have just one question. I note with interest your recommendation with respect to equality rights. I gather, though, that you are not convinced that the one amendment, or those two amendments as you put them, will solve the problem. In addition, you would like amendments to section 106A and section 7. Is that right?

**Ms. McPherson:** That is right. Our concern is that some of the initiatives or some of the terms referred to in that section may not be covered by the charter. When we consider the number of people using social assistance programs, it seems unjust to suggest that those programs not be covered under the Charter of Rights and Freedoms.

**Mr. Offer:** I would like to carry on with the discussion of this whole question of the spending power provision, section 106A, especially with PUSH being one provincial organization of a



number of provincial organizations across the country, maybe more so than any other presenter. In areas of exclusive jurisdiction with respect to federal programs having some national standards, section 106A will allow provinces, apart from entrenching the right of the feds to enter into these cost-share programs which I think in your presentation you say is good, to say: "Listen, we see the national program. It is in an area of exclusive provincial jurisdiction but we think we now have an option. We can now either go along with the national program or say that our province is different from other provinces." I think in your presentation you have acknowledged that in certain areas.

Now the provinces have that flexibility to meet, first, the federal standards, but second, they have the right to implement a program in their jurisdiction which particularly meets specific needs. Because indeed you are the Ontario affiliate and there are affiliates across the country, my question to you is, what would be the concern with respect to that?

I think you have indicated that in reality the needs in a general sense are there across the country. There is no question about that; I agree with you. Province by province, there might be a different emphasis, a change. Now with this section 106A, as the Ontario affiliate and the Alberta affiliate and the Saskatchewan affiliate, you will be able to go to your provincial government and say: "This is the national program. We think it has some good points, but we can urge you to opt out and deal with this matter very much so on an Ontario, Alberta or Saskatchewan base."

My simple question is, do you not think that degree of flexibility which is now founded in section 106A may in very large part help organizations such as yours to make certain that programs which are needed are implemented?

**Ms. McPherson:** I think you should be clear that in our presentation we are not saying this particular amendment to the Constitution is all bad. What we are suggesting in our presentation is that some of the wording could be made more effective. In the way it is worded now, we are concerned about the wording. First of all, it undercuts the equality rights of disabled people, but also in terms of spending powers it may undercut social services and health care services. We are not saying that every one of us would agree on a provincial and regional and city basis. Of course, programs should be adaptable to the needs of those areas. I do not think any of us would disagree with that sentiment. That is not

the point we are making in this submission. Our submission is just pointing out that some of the wording is too loose and too vague and needs to be tightened up.

**Mr. Offer:** I understand. Just to reiterate, you are not necessarily against the principle contained within section 106A. You are just concerned that the principle and intention, I think of all persons who signed the accord, is in fact going to be carried forward.

**Ms. McPherson:** We feel there should be national guidelines, but I do not think any of us will disagree that there has to be flexibility from province to province and I think some of the federal-provincial agreements allow for that. If you look at the Canada assistance plan, it allows for variation from province to province, as do some of the other programs. That has always been there and I do not think any of us would disagree with that.

**Mr. Chairman:** I should just note before turning the microphone over to Mr. Allen that the angelic choir you hear in the background was not necessarily planned that way. It perhaps adds significance to this morning's proceedings.

**Mr. Allen:** You just did yourself out of a compliment, Mr. Chairman. I was going to compliment you for arranging such stirring national music to keep our minds firmly at the task and our hearts fully motivated to achieve the best for our great country.

May I say that I am very delighted PUSH has come before us to lay its concerns about the Meech Lake accord before this committee. One of the most notable things that I think has happened in the half dozen years I have been in the Legislature is the increasing frequency with which groups representing various communities of the disabled have been here to tell us of their concerns and to do so with increasing sophistication and strength of argument and so on. I just hope that continues to happen. Second, it puts some credence in your suggestion that like other groups in the community, you also want to be fully part of the amending process and the feeding process to our senior politicians as they go into these constitutional debates.

**1120**

I want to ask you something very briefly that is not about something you have not said, or something you have said. You do comment that you are very pleased the accord appears to reintegrate Quebec into the Constitution and brings that province back to the tables of national deliberation.

I just want to ask you whether you have any concerns at all about the "distinct society" language and the special status of Quebec in that respect as providing any problems for people who are handicapped or disabled and their concerns? Does that help or hinder or is it a fairly neutral thing in your mind? I notice you did not emphasize it and I wondered whether it just simply was not a concern at all.

**Ms. McPherson:** I think I will let Harry Beatty answer that one, but I want to point out that we are part of a national organization. We want our Quebec people to feel that we are part of a unified group. We are happy to see them part of that. We respect the fact that they have a unique culture. That is important to stress. I know there are some concerns. Perhaps, Harry, you can elaborate. I noticed you had some things you thought might be a bit of a concern.

**Mr. Beatty:** I guess one way of approaching it is that I do not think there were concerns particularly within disability organizations when the "distinct society" principle was recognized. It was sort of in the second stage where section 16 appeared that things started to become more confused. I do not think there is any kind of perception that Quebec is less supportive of the equality rights of disabled people than other provinces or that the "distinct society" clause would be a threat in that way. In some areas, they have in fact been innovators.

**Mr. Southern:** Although I have had some concerns from some disabled people in Quebec about that very issue, as Harry said, over the past few years Quebec governments have been pretty good in some of the legislation they have passed. But you do not know what kind of government you are going to get down the road and it certainly has been raised to me. I did a little piece for a radio show I am working on and those concerns were raised, that people in Quebec might be denied programs and might not get as good treatment as disabled people in the rest of Canada.

**Mr. Cordiano:** I would like to thank you for coming to appear before us. Very quickly, I want to put forward a question to you about the fact that section 106A may enable us to have a national program with respect to guaranteed annual income. I would like your view on that.

**Ms. McPherson:** Groups of the disabled have been talking about that for a long time. In Ontario, we belong to the Income Maintenance for the Handicapped Co-ordinating Group. We have worked out an elaborate scheme around

that. It certainly is not ruled out at all. It is one of the things I know the Coalition of Provincial Organizations of the Handicapped and its affiliates, including us, will be talking to the federal government about.

I guess the complex part of it is that you have your income maintenance aspect and then you have other services. It is trying to make sure you maintain the services as well as a level of income that needs to be worked out. Harry, do you have some comments you want to make on that?

**Mr. Beatty:** It raises a number of issues. One is that constitutional jurisdiction over income support has never been all that clear anyway. As far as I know, it has never been directly determined, the extent to which the federal government can or cannot use its spending powers to pay support directly to individuals. When it got into old age security, there was a constitutional amendment, so the thing was not tested. Then there was a different kind of constitutional amendment when the Canada pension plan was instituted.

The whole area of income support, though, is split between the two different jurisdictions, federal and provincial, and there does seem to be some lack of co-ordination. For example, in January 1987 the federal government increased Canada pension plan disability, with the result that in some of the provinces there was a corresponding decrease in the social assistance paid to disabled people. In Ontario the family benefits were increased by \$50, but in other provinces the provincial government just, in effect, took the increase. Similarly, people who have rights to private disability insurance in many cases just found their disability insurance payments reduced dollar for dollar. In writing to the two levels of government, Mr. Sweeney and Mr. Epp, I saw that it was pretty clear there was no real discussion that had looked at these problems in advance.

Part of the concern with section 106A is just the uncertainty. Already it seems to be difficult to get consultation and reform in this area that looks at all the issues. Another example—

**Mr. Cordiano:** But if I could just interject, that in fact was the case prior to this.

**Mr. Beatty:** Yes.

**Mr. Cordiano:** It still exists. We have a lot of uncertainty about how the federal government would negotiate with each of the provinces on a number of items, and certainly, as my colleague Mr. Breaugh pointed out, the track record is not the greatest with respect to the federal government establishing programs in the social areas.



Some of those programs leave a lot to be desired in some areas. Who is to say? I mean, I would not put my trust in this government in Ottawa to come up with a program that is going to meet your objectives and your needs.

But I would say that, with respect to a guaranteed annual income program, we may have more of an opportunity to do that now because the federal government's jurisdiction in areas of exclusive provincial jurisdiction has now been recognized constitutionally. Therefore, it may open up this whole area to the federal government, whereas it may not have been clear before and we had a lot of controversy and a lot of negotiating back and forth. There may be a better opportunity for that, or would you disagree?

**Mr. Beatty:** The concern remains that section 106A does not really clarify the ground rules. It does not clarify in areas like that exactly where the boundary is between exclusive provincial jurisdiction and federal jurisdiction. It also just creates a lot of uncertainty about what the federal government can or cannot do.

I acknowledge the problems with some of the federal government programs, but in some of these areas, because they have the income tax powers and so on, they are the only ones with the money to do it, and it will not go ahead unless they can bring about some initiatives. This happened in the 1960s with the Canada pension plan, the Canada assistance plan and so on.

One concern would be that this just creates a period of uncertainty. We would like to believe that it has made the ground rules clearer, but the language is not that precise, and we are concerned about whether federal initiatives may be subject to extensive litigation and so on.

**Mr. Cordiano:** OK. Thank you.

**Mr. Chairman:** Thank you very much for joining us this morning. I think one of the things your submission has underlined very clearly is that any process which ultimately is developed to deal with constitutional change really requires this sort of discussion prior to and, probably to a certain extent, after certain undertakings in principle may have been arrived at.

As Mr. Allen has pointed out, I think there is a certain consciousness coming through today that would not have been coming through 10 years ago in terms of a number of groups and organizations that feel very strongly that perhaps their needs and concerns were not adequately dealt with as this particular agreement was arrived at. So we are very appreciative of the time you have taken. In a sense, we have received two

briefs this morning with some quite specific recommendations.

**1130**

**Mr. Southern:** Could I make one point?

**Mr. Chairman:** Please.

**Mr. Southern:** The point of consulting with persons with disabilities is really important, as you pointed out, but we have really got to make sure that that process works. I do not think many disabled people in the province even know that this series of hearings is taking place. I do not think the outreach to the disabled community has been very good at all. Specifically, as a print-handicapped person, you should try to get hold of a copy of the Meech Lake accord in a usable form, either on tape or in Braille. You will not find one and you will not get one. That is why I have not participated as fully as I might in these proceedings today, as you might have noticed. Cathy can pick it up and read it; I cannot. I think this province, and the federal government too, have really got to ensure that if you are going to have meaningful dialogue with the disabled, you have to give us all the tools we need to do it.

**Mr. Chairman:** An excellent point. Often those of us who do not have that particular disability simply do not think about it, and I am sure that must be of great concern. To you and others it seems so simple to say, "Look, if you are going to deal with something like this, have it in Braille, have it on tape so that we can deal with it."

**Mr. Southern:** And particularly when there are more than just blind people who are print-handicapped.

**Mr. Chairman:** Right. Thank you again for coming this morning.

I call upon our next witnesses, from the Junior League of Toronto: Romily Perry, the chairperson, and Sharon Moxon, the president of the Junior League of Toronto. I think we all have a copy of the submission you are going to make, so let me say welcome and thank you very much for joining us this morning. If you wish to proceed with your presentation, we will then follow it up with questions.

#### JUNIOR LEAGUE OF TORONTO

**Mrs. Moxon:** Thank you, Mr. Chairman and members of the committee. This is Romily Perry, chairperson of the public affairs committee of the Junior League of Toronto, and I am the president.

I will just take a minute or so to familiarize you with the Junior League of Toronto to put into

context why we are here. The Junior League of Toronto is part of an international women's organization which contributes effective volunteers and funds to improve its community. Admission to membership is open to all women between the ages of 18 and 39 who are interested in leadership opportunities and community involvement.

The Association of Junior Leagues, which is the international affiliation—there are leagues in Great Britain, Mexico and the United States—the Federation of Junior Leagues, which is our national group, and the Junior League of Toronto all support the goal of fair and equal opportunities for women and men and we will continue to advocate attainment of that goal.

The programs of the junior league, be they direct service to communities or training programs for our members, as well as our public policy statements, all attest to our strong commitment to improving the position of women in today's society. We currently have programs in the area of child care, services to separated and divorced women, health care for women, and information programs about women and addiction, and adolescent eating disorders.

I think it is clear that we do care about the rights of all, whether they be the needy or the disadvantaged, but above all we do care about the rights of women and we are concerned that the rights of women that were so fervently sought and entrenched in the Charter of Rights are at risk. Specifically, we would like to touch briefly on three issues: equality, shared-cost provisions and process.

Regarding equality, the positive comments we have heard on the Meech Lake amendments give the impression that the sole result of the accord would be to bring Quebec into the Constitution. The Junior League of Toronto supports that result. However, the ambiguous language of the accord makes its relationship to the Charter of Rights very unclear.

Experts such as John B. Laskin, Ramsey Cook and Eugene Forsey contend that there are grave problems in the accord with respect to its relationship to the Charter of Rights. They maintain that if the Charter of Rights and Freedoms is to be subordinate to Quebec's rights, then it should be stated clearly so that our first ministers can make an informed decision. If the charter is not to be subordinate, then let the accord state it clearly so that Quebec can make an informed decision.

It is our understanding that a constitution and a charter of rights are meant to protect us from the

caprices and whims of changing governments from time to time. We believe that the designers of the Meech Lake accord neglected to keep the future in mind or to look at all possible implications of the accord. We simply ask that the accord uphold equality rights and ask that the accord be amended to include sections 15 and 28 of the Charter of Rights.

The Premier has asked that we prove that our rights are in jeopardy, yet none of the first ministers can assure us that our rights are secure. The Supreme Court of Canada will probably decide this important question. When there is sufficient ambiguity in the interpretation of a provision that experts are divided on its potential ramifications, we really feel it is the responsibility of the legislatures to clarify these issues rather than to leave the impact of the accord to chance through the courts. If the interpretation by the courts is that the charter rights are secondary to the linguistic duality and "distinct society" clauses, then it would be too late because, of course, the accord would then be part of the Constitution. Amending the Constitution is not an easy task and there could be no assurance that it could or would be done.

The Premier has stated that unless he hears any new arguments by women, he will stick to his opinion that our rights are not in jeopardy. We come with no new arguments, but we are adding more than 600 voices to those experts we have heard, such as Mary Eberts and Beverley Baines, who say that our rights could be in danger.

**Mrs. Perry:** We are aware that the federal cost-sharing programs with the provinces represent about one quarter of the federal budget. Many of those cost-sharing programs in the areas of education, skills training, language training, health care and welfare ensure equality and equal opportunity for women.

The vague language in the spending-power provision makes us uneasy. A province will have the ability to opt out of newly created national programs and receive compensation if the provincial program is compatible with national objectives. Whose responsibility will it be to set the national objectives? Will they be set before the provinces opt in, or will they be negotiated down to the lowest common denominator to ensure that provinces do not opt out? Will programs be halted or delayed because no agreement can be made on national objectives or reasonable compensation? Will objectives be the same as standards?

The people of Canada rely on a strong federal government for national leadership in many



areas, including education, social assistance and employment programs. The accord will create a checkerboard of programs available across Canada with little hope of transferability of benefits.

Because the federal government's newly announced child care initiative was created in the spirit of Meech Lake, there are no national standards providing accessible, affordable quality child care. Child care is one of the pressing needs of women who are struggling to better themselves through education, struggling to support themselves with jobs still paying only 65 per cent of a man's salary and struggling to support their children when a reluctant father has disappeared. A national child care scheme could assure a national program with standards of care acceptable to all provinces. Child care groups could be involved with creating a solid foundation for the provision of affordable, accessible quality child care. However, we see this new child care initiative as a blueprint for future programs after the Meech Lake accord, and we despair. A lack of national leadership creates an inequality of services across the country.

Because the opting-out clause becomes law in the Constitution, the Supreme Court may ultimately rule on those matters which previously were negotiated among the provinces. What access will individuals or users or advocacy groups have to the courts to aid the latter in their decisions?

The language of this provision is so vague and leaves so many questions unanswered that we want an amendment that can assure that the federal government has the power to attach conditions such as accessibility, quality, universality and comprehensiveness to national shared-cost programs.

**1140**

The Meech Lake accord federal hearings came at a time and with such speed that many volunteer groups, including the Junior League of Toronto, had no time to study the accord and no time to confer among its members or affiliates. In essence, we were frozen out of the process. We believe it is vital to the wellbeing of Canada as a whole that its citizens in every sector comprehend our Constitution and the tenets of the Meech Lake accord.

In the Guide to the Meech Lake Constitutional Accord there is no discussion on how the citizens of Canada would be heard or how their concerns would be addressed. In fact, the language in the accord makes it quite clear that all 11 first ministers have committed themselves to having their legislatures ratify the accord without any

modifications. It is frightening to us that the governments of Quebec, Alberta and Saskatchewan have ratified the accord without giving the citizens of those provinces their democratic right to participate in developing the future of our country.

We are more fortunate in Ontario: we have been given the opportunity to speak up. We hope you are listening and we hope you appreciate that many more individuals and groups would have come forward had they had the resources. We think you have a wonderful opportunity to be the bridge between us and them. You could be heroes of the people of Ontario—mine, anyway—if you strongly recommend that the accord not be ratified without improvements and insist that the government be responsible to the people and call for a free vote in the Legislature.

It appears that little consideration was given to the people of Canada during the Meech Lake bargaining session. We are unnerved at the prospect of yearly first ministers' conferences entrenched in the Constitution. We fear that these conferences will become a forum for constitutional amendments that continues to exclude the citizens of Canada from the process. In addition, these conferences will cause enormous hardship to the volunteer organizations. Year after year we will have to commit volunteers' time and money, all of which are in short supply, to monitoring the conferences.

In conclusion, we have misgivings about the haste to strike a deal to bring Quebec into the Constitution. The Meech Lake accord will have far-reaching effects. If it is ratified as it stands, we will indeed be taking several giant steps backward for Canadians.

**Mr. Chairman:** Thank you very much. In particular, I thank you for the additional comments which were not in the written part of your brief. I think one of the comments we have made with a number of people is that I suppose in this kind of setting one always feels one should be giving a terribly learned sort of paper. I think it is important, especially talking about the Constitution—which is, after all, the expression, in a sense, of the lifeblood of the nation—that there is nothing at all wrong with a good dose of emotion and feeling in terms of underlining why a particular view is being strongly put forward, so thank you for that.

I open questions. Mr. Allen and Mr. Eves.

**Mr. Allen:** I sensed in your last remarks a little ambivalence about some consequences of the democratic process; that while, on the one hand, one wanted full participation, one did not want it

too often, because it was awfully demanding. There may be something in that that we need to reflect a good deal about as we get into this kind of year-in, year-out constitution-making and building. I do have the sense that I think you have that it could make the whole business rather trivial.

If you think of the consequences of constitutionalizing every problem we have in the country, everyone will want to have that issue embedded in the Constitution. What is our Constitution, then? Perhaps we go back to the old British sense that everything is constitution, all precedent counts, you just simply live out of your past and that is where it is at, which would be a very interesting and ironic turn of events for those who would see—

**Mr. Breagh:** No, thanks.

**Mr. Allen:** For those who see a rational process of recourse to the courts and so on, it would become a very interesting national experiment, to say the least. Whether it would be a beacon for the nations is another question.

Let me just ask you a couple of fairly straight questions. Are you familiar with the existence of Quebec's Charter of Human Rights and Freedoms and aware that it is probably a stronger statement than either the Ontario Human Rights Code or the national charter itself in a good many respects? If you are familiar with that, would you be as concerned as you have stated that there might be some subordination of equality rights, and so on, through the Meech Lake accord, knowing that in the distinct society that kind of a charter does prevail and would have impact on the courts?

**Mrs. Perry:** It has impact on the courts in Quebec. What worries us is section 16 in the Meech Lake accord which states that two charter rights, multicultural and aboriginal rights, will not be affected by this distinct society. The courts will have to interpret that other charter rights will be affected by the distinct society.

**Mr. Allen:** And your conclusion, I gather, at this time is that section 28 of the charter somehow would be adversely impacted by the "distinct society" concept not only in Quebec but outside Quebec and impacted by your exclusion from section 16, all that taken together.

**Mrs. Perry:** Yes.

**Mr. Allen:** So you are really more concerned, as I hear you—if I could phrase it the way in which the legal adviser to Persons United for Self-Help did just a few minutes ago—that when the premiers went back to the Langevin Block and

tried to get all political about this and responded to some criticisms, that they did it in a very piecemeal kind of way, that the "distinct society" question was not so much an issue for you as the very partial and limited way the premiers tried to redress some of the criticism but did not go far enough in including women, for example, and may have left out others, such as the disabled, as well, and their rights. Is that a fair way of saying it?

**Mrs. Moxon:** Yes. It appears to us that they have set up a hierarchy of rights. As far as we are concerned, the equality rights should supersede everything. They have to be the overriding rights as well as no discrimination. All of those other rights should be equal.

**Mr. Breagh** mentioned before that he could envision a lot of competition among those other rights, but they should all be equal as well and stand on their own. They are not mutually exclusive. They should have that equal sense in the charter, be named and be there, so that there is no ambiguity.

**Mr. Cordiano:** Could I have a supplementary on that?

**Mr. Allen:** Yes. OK.

**Mr. Cordiano:** With respect to section 16 in the accord, if you look back at the charter and the multicultural heritage in section 27, the legal experts have clearly stated that section 27—multicultural heritage—is an interpretative clause; it is not a rights-granting clause. Including it in section 16 does not bestow any additional rights. There are no rights there to begin with.

**Mrs. Perry:** No, but the courts have to interpret what is before them. Section 28 is an interpretative clause as well.

**Mr. Cordiano:** No, section 28 is very clearly reaffirmation of rights that exist. This is what the legal experts who have come before us have said. Section 15 and section 28 clearly grant rights, and section 27 does not. There are no more multicultural rights that exist in our Constitution. It is simply an interpretative clause. Someone who is claiming to be from whatever ethnic group will not have additional rights over someone from another ethnic group.

**Mrs. Perry:** We are not saying they will have additional rights. The point is the court has to interpret what is there in the Constitution, and if the court sees those two sections, whether they be interpretative rights or substantive rights, are not going to be affected by section 2 of the Meech Lake accord, they will have to interpret that all the other rights will be affected by that accord.



**Mr. Cordiano:** But only if you grant that section 27 grants rights. There are no rights being granted there; it is an interpretative clause which will—

**Mrs. Perry:** I think you are trying to draw me into a legal debate. I do not claim to be a lawyer; I never have.

**Mr. Cordiano:** Neither am I, but I am just saying what the legal experts have told us—

1150

**Mrs. Perry:** I have been listening to the legal experts as well. I hear the legal experts saying our rights are endangered. I think it is a complete folly to ratify an agreement with so many holes in it and so many flaws, an agreement that the people of this country do not feel comfortable with. We should deal with all the problems in the accord, all the problems in the Constitution now, and put it right.

**Mr. Allen:** I have a further question. On page 3 you say, "if the opting-out clause becomes law in the Constitution." One of my concerns about that concern is that the opting-out clause, whether it is there or not, would function anyway by virtue of the fact that the spending power related to it is in areas of exclusive provincial jurisdiction or areas of joint jurisdiction between the federal and provincial governments. So if opting out is built into the structure of the Constitution as it presently exists, and the section on spending power in the Meech Lake accord says what it says, it is really only saying what is already there, and what has been the practice in Canadian federalism.

I know what you are concerned about. It is the consistency of programming across the country. But is objecting to the opting-out possibility really a feasible way of getting at what you want to get at?

**Mrs. Moxon:** Mrs. Perry, in her part, did say that actually what we object to is the fact that we do not have the accessibility, the quality, the universality and the comprehensiveness added to those. If we could feel they were a part of it, maybe we might have more confidence in that particular clause.

I do know, at this time, the provinces sit down and negotiate the federal programs, etc. I do believe this opting-out clause had some limitations, too, in certain areas. It would not touch things that are already in existence, as far as I know.

What I think we felt is that we could have had confidence in the federal government being able to provide a fairly consistent program across the

country which would meet the needs of all Canadians, not in a patchwork of situations across the provinces. Just as Saskatchewan created medicare and then the federal government took it on and said, "That is a great idea, let's take it across the country. Let's do that; it is great"—and it should have been compensated for having such a wonderful model program—this will not happen any more. The provinces are going to be on their own, doing their own thing. They will get their money from the government, but there will be no accountability either. We cannot go to the federal government and say, "You gave the province money for this program, and the federal government does not care what happens any more."

I see that happening with the provincial government giving it to the municipalities for education. There is no accountability whatsoever. It gives the money to the boards of education. They spend it. The province does not really care how it is spent. It is the accountability aspect of it. It is what we are hoping to see created that will be consistent that we can understand and believe in and move across the country. Why must disabled people be treated differently in each province? Why must child care be different all across?

We are lucky here in Ontario. We are marginally luckier than many other provinces because of the amount of money we have. That is our sense of it. It is the national aspect of it that we really feel is so important.

**Mr. Allen:** I hear what you are saying. I guess my concern is, does that mean that what we want in Canada is a unitary state with only one level of government? That is the only way you would get that kind of unity across the board, otherwise you begin sharing powers. Once you begin sharing powers you are into diverse politics and interactions that make it extremely difficult.

I think what you are trying to tell us, and what various groups have been trying to say to us when they addressed this question is they would not only like to see that the federal power has specific standards but that there be somewhere in the Constitution, or in the understanding of the nation, a specific set of criteria laid down as to what those standards are, such as were imposed in the Canada Health Act, which required universality, accessibility, public funding and that series of criteria. It was not just that the federal government had the power, but that a certain kind of federal government be there that had a commitment to those things.

I guess the question is, can the Constitution guarantee that kind of government. The people of Canada elect, as they have just done, a government that is prepared to institute a day care program across the country that really does not have those kinds of commitments. Where is the line between the politics and the Constitution in all that? I guess I am still having a bit of trouble just getting a fix on how we do what you want to do.

**Ms. Perry:** In bringing up the opting out, we are just trying to point out all the errors in one section. The wording is very vague, to have "reasonable compensation" if programs are "compatible with the national objectives." The word "compatible" is weak. Our worry is that if they can opt out in addition to having all these weak and unspecific requirements on them, plus receive compensation, who is going to benefit? We do not think the users of the service are going to benefit, because they are not going to be compensated; the government is going to be compensated.

In the area of child care, for instance, if the wording of the objectives is so unspecific that it does not rule out informal child care services, the government could put all its money into setting up a registry of informal child care people. That is not going to meet any of our personal objectives of having quality child care.

So if we have all these weak words that lack definition, and on top of that an opting-out clause, we just feel that the federal government has absolutely no clout when it comes to insisting on standards or any kind of level of care being given in any program.

**Mr. Eves:** I just have a couple of short questions.

I note the chairman's remarks that a good dose of emotion does not hurt. A good dose of common sense does not hurt either, and I think you have provided both in your submission here today.

With regard to the ambiguous language, going back to the point Mr. Cordiano made, you are quite correct, I believe, in that there are experts on both sides of this issue who will give you two totally different interpretations. If there is any doubt whatsoever, I think you are quite right, we are entitled to have that clarified, and the time to clarify it is before you ratify it.

**Mrs. Perry:** Absolutely.

**Mr. Eves:** That almost goes without saying, I would think. If every one of the 11 first ministers tells us that was their intent, I do not see why this is going to jeopardize the deal.

When Professor Baines was here, she indicated that for legal reasons she might prefer an all-encompassing amendment which says that all rights under the charter supersede or have primacy over the Meech Lake accord. Would you be happy with such an amendment?

**Mrs. Perry:** We could support that, yes.

**Mr. Eves:** The other question I had for you was with respect to national programs. We were told that initially the wording was "national standards" in the draft and it was later changed to "objectives." Would you be happy with the word "standards" as opposed to "objectives"? Do you think that would satisfy your concerns or are your concerns much deeper than that?

**Mrs. Perry:** We think that "standards" would be a much better word, yes. We would like to see the word "compatible" changed as well. We believe "comparable" would be a better word to use in that section. "Initiatives" should be clarified as well. Since it is in child care, no one really knows what initiatives in child care are, because there has been no precedent.

**Mr. Eves:** One last area that you touch upon is process. I think that is certainly an area that all members of the committee would agree we can work on with respect to the future. I would hope that if enough people keep on suggesting the idea of the free vote, eventually that will take hold of all committee members.

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**Miss Roberts:** I will be very brief. Thank you very much for your presentation. As I indicated, it focuses on some very common-sense ways of dealing with the problem.

As you have answered to Mr. Eves, you are suggesting other wording and that other wording is still open to chance, as you have indicated in your brief, because you leave it to the courts to decide. No matter what word you put in there, no matter what series of words you put in there, no matter how long you make the document, you are going to leave it open to chance, because the Supreme Court is going to deal with it.

Maybe the best thing—and this is heresy, I assume—

**Mr. Chairman:** We need some heresy.

**Miss Roberts:** I am into heresy today.

I would suggest that the part with respect section 106A be taken out completely. Would you agree that was the best thing to have done? Why amend it if you can take it out completely and just leave it to chance as we have been for the past 100 and some years?



**Mrs. Perry:** It could be taken out completely. I think our approach is to try to make the 11 first ministers look better than perhaps they were and to suggest that the accord does have some positive sections to it. We are not suggesting, for instance, today to scrap the whole accord, although many of our members personally feel that would be the best solution as well. We are trying to take the positive approach and perhaps offer other words or other ways to deal with a flawed document.

**Miss Roberts:** You do not think it would be better if section 106A was taken out completely, that particular change?

**Mrs. Perry:** If there was still something in place where the federal government would have the power to initiate national programs with standards.

**Miss Roberts:** You would like to use those words, "programs" instead of "initiatives"?

**Mrs. Perry:** At the moment, I think the words "national standards" have been clarified by the courts, so I feel comfortable using those words. I do not think "objectives" has been.

**Miss Roberts:** I would not be as comfortable with "standards" either.

My last question, if I might, is the process, which is the most important thing, because the process is going to continue whether Meech Lake passes or not. What do you suggest?

**Mrs. Perry:** We do not think Meech Lake should go forward at all. I think we all have to deal with the fact that we have many questions to deal with in our Constitution. We are very new at this. It was only brought in this decade. We have to spend money on educating the people of this country so they can understand what our Constitution entails. We have to supply groups with resources, both with materials and experts.

The task may look completely overwhelming to start with, but short-term pain brings long-term gain and if we could just deal with the whole thing now and put it behind us so that we do not have to bring it up every year and make changes and make groups hop so that they can ensure that their rights are not being trampled on or they are not being left out again. It is a bad process to even suggest that we can look at our Constitution over the next 500 years and change it as we go along. It should be dealt with now. No other country that I am aware of deals with its constitution this way.

**Miss Roberts:** Maybe some of these concerns should not be in the Constitution but in other types of legislation. Would that not be more appropriate?

**Mrs. Perry:** Yes.

**Mrs. Moxon:** We have also heard the statement that it is looked upon as corporate bylaws and they are just changing them at an annual meeting every year. This is far too important to be tinkering with the Constitution.

**Mr. Chairman:** Can I just make one comment? It seems each day there are certain themes that emerge that have not necessarily been as prevalent. One of the things Mr. Breaugh touched on earlier—and I am not sure what the answer is, but I just want to share it with you and perhaps get your thoughts—when we talk about national standards or national whatever, it seems to me in this country, especially those of us living in Ontario have to be awfully careful that we do not feel that national and federal are the same thing, that there is a very legitimate role for the provinces to play in defining what is in the national interest. Probably the farther you get away from Ottawa, the more strongly felt that is.

I raise that in conjunction with section 106A specifically, because I keep asking myself, if we were sitting in Victoria or in Edmonton, I think some of the perceptions of what that does—again, whether it was real or not—is that there is protection there for things they would like to do and which they might see as being very progressive and positive; Ottawa is just too far away and they do not want to be in a position where they are putting all their eggs in that basket. I guess one of the things we are struggling with is that when we talk, as we do here about national programs, shared-cost programs in areas of exclusive provincial jurisdiction, we have had over the last many years political discussions among the provinces and the federal government which then led to particular programs.

Provinces have been very concerned at different times about giving the federal government any kind of concrete right of access, if you like, to some of the areas that according to the Constitution are provincial. At the same time, many of us have said that we would like to see certain kinds of broadly national objectives and standards; we use these different terms. I think one of the things we are wrestling with as a committee is that at times one senses there is a tendency, particularly in Ontario, to say we will simplify everything if we let the federal government do it.

I think the answer is going to lie somewhere in the discussion between the two. The point Miss Roberts makes, I suppose, is are we better off leaving that to an ongoing political process which from decade to decade may be different and may

reflect different desires and different norms. Ten or 20 years ago, we would not be talking about child care the way we are today, for a whole series of reasons. I do not think we would want to do something that in perhaps 10 or 20 years put everybody into a straightjacket.

In looking at that, would you agree that, none the less, there is a legitimate provincial interest in defining the national will, the national standard, the national objective?

**Mrs. Perry:** Absolutely. Democracy is a consultative process, and I think not just the politicians should be consulted but also the experts in the area you are talking about, whatever the program is, such as child care or health care, should be consulted completely as well. I cede the point you are making that we cannot give all the power to the federal government to set up the program. I do not want to see that happen either. I definitely want a consultative process all across the board in each province.

**Mr. Chairman:** A consultative process that, at the end, would lead to some statement of national standards or objectives, but one which was a co-operative process.

**Mrs. Perry:** That is right.

**Mr. Chairman:** Thank you very much for joining with us this morning and sharing your thoughts. It has been most helpful. Again, I think there are a number of issues emerging that various groups are bringing forward, but I think everyone who brings the same point forward also brings a slightly different perspective or aspect, which is most helpful to us as we continue.

**Mrs. Moxon:** Thank you very much for having us. We have enjoyed the experience.

**Mr. Chairman:** I now ask for Willard L. Phelps, leader of the official opposition in the Yukon. It is a pleasure to have you here, Mr. Phelps. Perhaps I will further identify you as leader of the Progressive Conservative caucus in the Yukon. As you know, the government leader was here last week and another of your colleagues, the leader of the Liberal Party in the Yukon, will be with us, I believe tomorrow. I think this does afford us an excellent opportunity to get a sense of the views within the Yukon Legislature.

We have received a copy of your submission, along with various attachments, including your presentation to the special joint committee on the 1987 constitutional accord. Perhaps I will simply turn the microphone over to you and you can make your opening remarks and then we will move from there into questions.

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WILLARD L. PHELPS

**Mr. Phelps:** Thank you, Mr. Chairman. I welcome this opportunity to appear here before you. As you have said, the government leader has been here, as I am appearing today, and the leader of the territorial Liberal Party will be here, I believe tomorrow, as you have said.

What we are trying to get across is that Yukoners are united in their opposition to certain aspects of the Meech Lake accord. Our concerns are shared by the aboriginal people in many respects and by our colleagues in the Northwest Territories, who I understand have been appearing before you as well.

Mr. Penikett provided you with a sense of the outrage Yukoners feel about certain aspects of the accord. My focus today will be to look at what we see as some very possible and positive solutions to the problems that confront us in Yukon. We see the proposals as not only realistic but also as extremely minor in terms of satisfying egregious errors in the accord itself. I would also like to advise that on November 16 we debated a motion about Meech Lake—it is in my written presentation—that was unanimously passed.

I would like very quickly to go through the brief I presented before the special joint committee on the 1987 constitutional accord. I will be focusing on the major area of concern in my remarks today, and that has to do with the need for unanimity for us to become a province at all under Meech Lake.

In the brief I presented and am presenting today, in appendix II of the joint presentation to the joint committee, we have six proposed amendments. For the most part, they are extremely minor in nature. To us, by far the most important issue is the proposed clause 41(i) of the Meech Lake accord.

I would like to talk very briefly about the development of responsible government in Yukon because that push for responsible government is something that has been shared by all Yukoners. We have been on a quest since 1898 when Yukon was carved out of the Northwest Territories as a separate territory. Our history with regard to responsible government is one that has until now at least put us far ahead of the Northwest Territories in terms of constitutional development. We had our first wholly elected Legislature in Dawson City in 1909. By contrast, the Northwest Territories, I believe, had its in 1971, so we were a long way ahead.



We now have party politics. We have 16 MLAs in the House representing three major parties in Canada. In 1979, we ended up in a situation where we had effective control of the territory and the Legislature in the hands of our representatives because at that time, the commissioner, who was the head of government, became in effect the Lieutenant Governor of Yukon; we had our first wholly elected cabinet in 1979 and our first government leader in 1979, who had the right, under the auspices of a letter from Jake Epp, to call himself Premier, but that has never in fact happened.

We have a Legislative Assembly in Yukon now which operates on the same basis as the provincial legislatures. We have a cabinet system. We have a Lieutenant Governor in effect. The difference between our jurisdiction and the jurisdictions of provinces lies in the limited areas over which we have jurisdiction. We do not have jurisdiction over many areas of local concern, such as land for the most part, forestry, nonrenewable resources and fresh water fisheries.

I think it is important that the committee understand the strong desire for more responsible government and eventual provincehood. It is quite simple. What we are saying is that people in Yukon ought to have the same rights enjoyed by southern Canadians to make decisions in Yukon regarding matters of a local nature. We feel that officials living in Ottawa have little in common with, and often do not understand, the needs and aspirations of residents in Yukon.

For example, one might ask what does a person living in an Ottawa suburb who rides a bus to and from work and spends his day in an office building many storeys high in Hull, Quebec, have in common with a trapper residing in a small town like Teslin or a placer miner residing in a small town like Mayo in the Yukon. How does the average Yukoner ever begin to effectively lobby the system for change or to get his point of view across? How do they relate to the bureaucracy in Ottawa? Not very well. It is almost impossible for a realistic dialogue to occur between our average citizen and the political masters who, when it comes down to it, are the bureaucrats who run northern affairs in Ottawa.

I guess another point we make to people is that the size of the federal government in dealing with matters of a local nature is extremely costly. Whenever we have taken on greater responsibilities, we have done it far more sensitively and at a far more moderate cost than the huge machinery in Ottawa can provide. We can respond on a

timely basis to changing conditions in Yukon. We have seen this in issues such as the control of highways, trying different kinds of programs to control dust, different kinds of surfacing and so on. We had to wait for years to get regulations changed that were in effect across Canada. In the Yukon it takes a matter of days to meet the realistic needs in Yukon.

These are some of the reasons regional government is better able to meet the needs of the people it serves than a distant national government with regard to matters of local concern. In a country with the size and diversity of Canada, proximity to the people being served is important. As one former commissioner of the Yukon Territory said, "You can't drive a team of horses with reins 3,000 miles long." For most Yukoners, the question of provincehood for Yukon is not if; it is when.

As Mr. Penikett has already stated, Yukoners have several concerns regarding the Meech Lake accord. These include the right of each province to veto the creation of new provinces, the method in which Senate and Supreme Court of Canada appointments are to be made and the right to attend conferences on the economy and other matters. We are proposing specific amendments to deal with each of these issues and, as I have said, that is in appendix II.

In this presentation, I would like to expand on the issue regarding the right of each province to veto the creation of a new province. As the committee is undoubtedly aware, most Yukoners believe the changes to the amending formula contained in the Meech Lake accord, which now require the consent of all 11 governments to create a new province, will make eventual provincehood for Yukon a remote possibility. We in the Yukon Progressive Conservative caucus have been seeking solutions to that issue and posed this question: how might the 1987 constitutional accord be refined to accommodate Yukon's concerns without impairing the constitutional consensus that has been achieved?

## 1220

In our correspondence with the Prime Minister of Canada and in our discussions with political leaders across Canada, it seems there are only two reasons why provinces have a direct interest in whether Yukon might become the next province of Canada. If people sit down and really examine the issue seriously and consider it, why would Ontario or Alberta or Quebec or any of the provinces have an interest in that issue of us finally becoming a province?

We feel there are two things that would justify a concern on the part of an existing province in Canada. The first thing is that a new province or new provinces would change the amending formula, the amending procedure in the Constitution. We recognize that and we recognize that it was very hard to achieve unanimity on the amendment procedure. You did not even get unanimity when the Constitution was repatriated. So we have looked at that and we have conceded that that is ethically, morally and legally a justifiable concern.

The other thing that we hear over and over again as an area of concern has to do with whether a new province would alter the fiscal relations among governments. Does it mean that the pie would be smaller in effect, that some of the provinces might not get as much in terms of payments from Ottawa, that the richer provinces might be penalized because there is a new province? In thinking about this and working on the issue of justifiable concerns that provinces might have, it is not something that was done overnight; it is something that we worked on with constitutional experts and entered into a dialogue for some considerable time.

Those are the only two areas that we could see. We cannot understand why, for any other reason, provinces would have any concern at all about the creation of Yukon suddenly as a province. In dealing with those concerns, on page 8 of the brief before the joint committee, we proposed an amendment, a new clause 41(i), which would be "the conferral of equalization payments under section 36(2) and of amending powers under this part on new provinces."

What we are saying is that we would like to see Yukon enabled to become a province, except for the conferral of the equalization payments and of amending powers. There we can see an argument for unanimity, but we would like Yukon to be assured—and by this amendment it would be—that it would become a province in every other aspect except for those two areas.

It might be said by some that we are proposing a qualified future provincehood for Yukon or that Yukon could not really be a province without participating fully in the amending formula and equalization payments. We would strongly disagree. As we all know, Alberta and Saskatchewan became provinces long before they entered into the resource transfer agreements with the federal government.

From our perspective, the proposed amendment would leave us in a much better position constitutionally than in 1982 as the really

important aspects of provincehood could be dealt with bilaterally between our government and the federal government. We recognize the sensitivity that many of the first ministers have with regard to the amending formula. It took a lot of effort and time for the first ministers to agree on the present amending formula, and we are prepared to accept the veto over any change to it.

With regard to the issue of equalization payments, we feel that Yukon would never push to become a province unless the financial arrangements made with Canada were satisfactory. At present we have financial arrangements with the federal government, known as the formula financing agreements. These agreements leave the territories in much better financial shape than would participation in the present system of equalization payments enjoyed by the provinces.

As we negotiate devolution of responsibilities from the federal government, it is safe to assume that we are not going to take on new responsibilities unless the financial arrangements are good. So when we achieve provincial status, it is unlikely that we would even want to participate in the existing equalization provincial payment scheme. It is not of concern to us because our present arrangements with the federal government are and will continue to be of such a nature that they will be richer than being part of 36(2).

In summary, we have relayed some of the history of the development of responsible government in Yukon to you. We have also discussed some of the reasons that underlie the strong desire of Yukoners for more responsible government and eventual provincehood.

We have provided you with specific amendments which maintain the integrity of the present accord yet are designed to: (1) ensure the territories, like the provinces, respect the fundamental characteristics of Canada; (2) allow Yukon and the Northwest Territories to be sovereign in their own right to the same extent as existing provinces; (3) clarify territorial rights to representation in the Senate; (4) provide equal opportunity to qualified territorial residents in relation to appointment to the Supreme Court of Canada; and (5) ensure that northern Canadians have a say in matters that affect them by allowing territorial government leaders participation in first ministers' conferences.

In conclusion, it is my personal belief that had the territory had representation at the talks that led to Meech Lake, I doubt very much that any of these amendments would not have gone forward.



They would all be in place. It is my feeling that we really were victims of neglect.

It has been my observation throughout the years that I have attended various national conferences on the constitutional talks and aboriginal rights that when we have had the opportunity to speak at national gatherings, when we have been able to put our view forward, we have always enjoyed a good deal of sympathy and understanding from Canadians across Canada. Wherever our position was reasonable, we have always enjoyed success in making our views felt and acted upon.

I honestly believe that had we been present at Meech Lake, these amendments would be in place right now.

**Mr. Chairman:** Thank you very much for giving us, in effect, a summary of the presentation to the special joint committee as well as your other comments.

I think you have raised a number of points that we certainly got into the other day, but you have put, again, a perspective on some of those. I think some of the recommendations you have made are quite pointed and specific, which is very useful to us.

We will start the questioning with Mr. Eves.

1230

**Mr. Eves:** I think every amendment you have proposed is rather reasonable, if I may say so. It should go without saying that all Canadians, no matter where they reside in Canada, should have equal access to equal opportunity with respect to appointment, be it to the Supreme Court of Canada or to the Senate of Canada. You have drafted a very well considered amendment with respect to admission of new provinces to Canada and one that I think everybody could live with.

On a point of clarification with respect to conferences on the economy and other matters, you indicate that the territorial governments should be entitled to attend these conferences on the economy and other matters in their own right and make statements but not have the right to vote. With respect to constitutional conferences, you do not add the statement, "and not have the right to vote." I just wanted to clarify whether it is your intention that you should or should not have the right to vote at constitutional conferences.

**Mr. Phelps:** It is our intention that we would not have the right to vote until there was unanimity with regard to our position at the table.

**Mr. Eves:** It is refreshing to see that all three political parties are approaching this with the

same point of view and the same principles and concerns. Thank you.

**Mr. Offer:** Reading the amendment you are proposing with respect to clause 41(i), I must admit I am having difficulty in truly appreciating what is being suggested. I say that for this reason. The concern you have raised today has largely to do with the acquiring of provincial status by the Yukon. I am not saying for a moment that it is not related in some way to the matter we are dealing with with respect to the Langevin agreement, but I see it in some ways as something distinct. Indeed, in terms of the amendment you have brought forward, 41(i) is part of the Constitution but something outside of the Langevin agreement.

The submission seems to be, how can the Yukon acquire somewhat of a provincial status? You have suggested this quasi-provincial status. I see it as being couched around the whole question of the amendments, the unanimity requirement. Do you not think that this type of suggestion really brings into play a different type of Canada?

We have provinces and territories. We now have quasi-provinces which may or may not be allowed to take part in some or other form of a conference, may have a vote or may not have a vote, all dealing with the presumption and the underlying theme that I seem to detect, that you see the unanimity requirement as valid.

The introduction of new provinces into this country, I sense from you, may indeed impact on the other provinces and, yes, maybe those provinces ought to have a veto, but this is the way we are going to try to get around it. I am wondering what that says for the future, that we now have territories, provinces, quasi-provinces.

In short, I am sort of sensing that there is possibly an agreement that the unanimity formula with respect to the introduction of provinces is a valid exercise because that can indeed affect other provinces.

**Mr. Phelps:** I guess you are partly right. I should make it very clear that the proposal we are making is from the Progressive Conservative Party in Yukon. It is not one, of course, that has been brought forward by other parties. They have not really taken a position on our stand on this. But I really believe that the way to salvage Yukon's position with regard to what has happened with Meech Lake is to take a bottom-line position that we can live with and recognize, whatever the arguments might be on the part of anybody arguing on behalf of one or more of the

provinces. We have bumped into arguments from premiers about the righteousness of their position of being able to veto the creation of a new province in Canada.

I guess what I am saying, and what we are saying, is that we can see, if you examine it very carefully, two minor aspects in which a province could be affected adversely by the creation of one or more new provinces. We can only see two things. That is what we are saying. One of them, of course, is that your vote under the amending formula as a province would change. The whole formula changes as you add more new provinces. Instead of 10 and seven, it is 11 and what, or 12 and what, and possibly 13 and what given there are two possible provinces to be created in the future from the Northwest Territories.

What we would like to be able to do is to ensure we have all aspects of a province so that we can go to the meetings as of right, so that we attend all conferences as of right and so that we can proceed solely on a bilateral negotiation basis, gradually take on the devolution of responsible government at our pace and only have to be concerned about our negotiating stance with the federal government. We see a great deal of uncertainty being foisted upon us by the present Meech Lake.

We see a situation with those in Ottawa, and it is a continuous struggle, who do not want us to gain new powers. There are people there who have a vested interest. It is a turf question. If we take over forestry and if we take over lands, there is a whole bunch of people in Ottawa who now devise all the policy, who now have that control and whose jobs depend upon the jurisdiction remaining in Ottawa. We have a terrible fight on our hands.

It takes a fair amount of political will on the part of the federal government to have anything devolved to us at all. The uncertainty raised by Meech Lake is that we are not even sure Ottawa has the authority to transfer areas of jurisdiction to us without consultation with and the express approval of the provinces. That is one area of concern that has been raised by our constitutional experts. It is a moot point. We certainly see Meech Lake as standing in the way of our ever getting to a stage where we have all the trappings of a province except for a vote at the table. That is our concern.

Now you say, "Do we not have all kinds of different things between territories and something different and then a province?" I guess all we are saying is the territories themselves are changing and their participation at constitutional

conferences changes almost yearly. We were at the aboriginal conference talks as a right. We attended all the meetings that led up to the aboriginal constitutional meetings. We were able to make our case at the meetings. We had a fairly strong impact on many of the provinces in terms of the lobbying efforts, all provinces enjoy that. We see it as extremely important that we play a full role. We just cannot understand why provinces feel they would have any need to block us from arriving as a full partner in Confederation, save and except for the two minor areas I have expressed to you.

I guess the short answer to your question, if there is a short answer, is that I am saying yes, there is a very narrow area of concern, an area in which provinces ought to have a say. That is really the amending formula. There are the financial aspects too, but we just do not see that as a problem. I just cannot conceive of us coming into Canada as a province in a situation where our financial agreements are not at least as good as they are now. Right now they are extremely rich as opposed to what many of the other provinces enjoy.

**1240**

**Mr. Offer:** Again, from your response, what seems to come back with respect to the unanimity formula is that one of the reasons for the requirement for unanimity is something you have accepted, in fact there are two reasons you have accepted it, the primary one being equalization, that it does have the potential of impacting on each province. Of course, this is the reason for your proposal to amend clause 41(i) of the Constitution.

**Mr. Phelps:** Can I come at it a different way to just try to put our side of it to you, because maybe we are losing something here. We do not want to be placed in a situation where we have to say to Ontario, or Alberta for that matter: "We want to have control of nonrenewable resources. We want to have a resource revenue-sharing agreement with Ottawa. We want to get some of the revenues from the oil in the Beaufort Sea. We want to take over forestry in the Yukon." We do not feel those negotiations ought in any way to be blocked by a province. We do not see what stake a province has in those issues, whether we run the highways in the Yukon or whether the federal government does, whether we are the ones who make policy with regard to mining and development in the Yukon, things of a local nature, or whether Ottawa does.

What we are concerned about is that we do not want to be placed in a position where any kind of



devolution of that sort requires the blessing of each and every province, because we will leave ourselves open to a very simple thing, the possibility of—blackmail is a strong word, but Prince Edward Island might say, “We are not going to let the Yukon become a province and let it take over nonrenewable resources on any terms, no matter how reasonable they are, until we get,” whatever it is it wants at the time; or Newfoundland might say, “Until we get more control over fisheries.” We do not see that the provinces have a genuine stake in those kinds of issues.

Meech Lake leaves up in the air what kind of power provinces have to block that kind of gradual devolution of responsible government to the Yukon. We want it to be very clear that we can become a full partner in Confederation except for two areas in which the provinces do have a legitimate stake. If that is clear, then we can proceed with our life and move towards that. If it is not clear, we are concerned that we will be in a mess for some time to come.

**Mr. Allen:** I think all of us, Mr. Phelps, are very deeply concerned about the fact that somehow the territories have been dealt out of participation in their determination with respect to their own future, and I will not elaborate on that.

Your proposal on page 8, I might observe, is devilishly clever because it appears, on the one hand, to allow any province that objected to the conferring of those equalization payment rights upon any new province to object and thereby effectively to stop that happening. At the same time, given how fundamental subsection 36(2) is to Canadian Confederation and our sense of equal rights and full participation in nationhood on the part of all provinces, it is difficult to imagine a province effectively maintaining its opposition for long in the face of the public storm that I think would follow and the pressure that would exist on the federal government, which would raise questions about any province denying what has been a fundamental principle of

Canadian Confederation since the Rowell-Sirois report and the aftermath of that great founding of our constitutional future.

I do not know whether you want to comment any further upon that in the light of my comments, but I just make that observation. It is a very clever amendment.

**Mr. Phelps:** It is an attempt to really focus on the areas where provinces have a legitimate concern. What happens is when we talk to people from the provinces they say: “Well, there is a whole bunch of waffle up north. We all as taxpayers have been developing it and so on and we are not sure if we want you people there to become a province.” I guess southerners, quite naturally, have not taken the time to consider the issue very carefully. Why would they concern themselves over us having more responsible government? We can do it more efficiently and it is still their resource as much as anybody’s.

If you focus on the two legitimate areas, then it becomes quite evident that the equalization part of it, as you have said, would probably fall away very quickly. We come down to one thing: how is a new province or two new provinces going to impact on the seven-10 formula? I think if that was the only area that all parties to Confederation focused on, we would come up with a solution very quickly. I do not see these as really big, major blocks to our finally becoming a province, if it comes down to just those things.

**Mr. Chairman:** Mr. Phelps, we want to thank you very much for joining us this morning and for providing us with a number of thoughts and ideas, and particularly for the specifics of the amendments you have put forward. We will be looking at the broader paper you presented to the joint committee, I am sure, in some detail, but I think you have outlined some avenues here that we had not looked at before. I thank you very much for joining us.

**Mr. Phelps:** Thank you.

The committee recessed at 12:47 p.m.

## AFTERNOON SITTING

The committee resumed at 2:02 p.m. in room 151.

**Mr. Chairman:** Good afternoon, ladies and gentlemen, I see a quorum. We can begin our afternoon session, and if I might call upon the representatives of the Chinese Canadian National Council to come forward: Ms. Della Ng, the executive director, and Gary Yee, who is the national president. We thank you very much for coming and joining us this afternoon. We are in the process of distributing your opening comments.

Mr. Yee, please proceed however you would like. After your presentation, we will undoubtedly have some questions.

## CHINESE CANADIAN NATIONAL COUNCIL

**Mr. Yee:** The Chinese Canadian National Council was formed in 1980 after a racist incident on a television series, W5, The Campus Giveaway segment, where they implied that foreign students—and showing Chinese faces—were taking over the universities, when, in effect, the faces they showed were Chinese Canadians.

Out of that—probably a blessing in disguise—grew the national advocacy organization of chapters across Canada. Currently we have, I think, 23 chapters across Canada in various cities. We are mainly an advocacy organization and because of that we are here to present our views on the Meech Lake accord.

A very brief word about the Chinese Canadian community from the historical perspective: A lot of immigrants came to work on the railway. Right after the railway was finished, the provincial and federal governments began imposing very discriminatory legislation against Chinese Canadians. The infamous head tax, for which we are currently working to seek redress, was imposed right after the railway was finished.

The British Columbia government tried very hard to limit Chinese immigration. There were all sorts of other discriminatory legislation against Chinese Canadians, with respect to professions that they could be engaged in, voting rights, education and all sorts of matters.

Because of this past, we tend to place a very high value on the charter and we want to rely very much on the protection which is in the charter. The charter is consistent with our view of Canada and we are very pleased that the section with

respect to multiculturalism is in there. That is definitely part of our view of Canada and, quite frankly, the constitutional accord does not reflect our view of Canada.

We do acknowledge the importance of Quebec. We have a very strong Montreal chapter but it, too, is in agreement with us that there are some very fundamental changes that need to be made to the accord. In some ways, we empathize with Quebec and its search for protection of identity and protection of culture, but at the same time, as I said, our view of Canada is not consistent with the accord's view.

At this point, I will turn it over to Ms. Ng, who is our executive director, and she will have some comments to make on the charter.

**Ms. Ng:** The first point I want to bring up is the Charter of Rights and Freedoms. The reason we are concerned about it is that we are worried that sections 15 and 28 of the Charter of Rights and Freedoms could be overridden by the provisions in the Meech Lake accord, as Gary mentioned a little while ago.

Since the accord gives express protection to some charter rights—like clause 16 of the accord, which says that native and multicultural rights are not affected by the “distinct society” clause—we are not sure whether that means the other charter rights are not being protected, like the women's equality rights or mobility rights and other rights that are included in the Charter of Rights. Are other individual rights being affected by these provisions? We are not sure about that. Does that mean that women and men could be discriminated against by government actions under the “distinct society” and the linguistic duality provisions?

Therefore, we would strongly recommend that a provision be added, which states that the Charter of Rights and Freedoms prevails over the accord, and delete clause 16 to remove the ambiguity as to the coverage of the accord.

The second point is that within the accord there is an opting-out clause. The accord allows provinces not to participate in national cost-sharing programs that are compatible with national objectives such as medicare, child care, language and skills training programs, etc. We are really worried that under that provision it is very difficult to have national social programs that can be entertained by Canadians across Canada.



We do not want to see that. This clause contributes to the regional inequities and inequalities in terms of access to services, and therefore we recommend that the provision that the provinces can opt out of the cost-sharing programs be deleted from the accord to ensure that Canadians can entertain equitable provision of services across Canada.

A third point we want to mention is the whole concept of multiculturalism that is missing in the accord. The concept of multiculturalism has not been included in subsection 2(1) of the accord. In clause 2(1)(a), the concept of the linguistic duality of Canada, namely, English-speaking and French-speaking linguistic duality, has been acknowledged. If clause 2(1)(a) is allowed to stand by itself without a similar clause addressing multiculturalism, when over one third of the Canadian population is neither of French nor Anglo origin, does that mean the Constitution Act is simply not comprehensive enough to tend to the pluralistic nature and needs of our Canadian society? Would the linguistic needs of many Chinese Canadians whose mother tongue is neither French nor English be addressed?

We believe that bilingualism does not embrace all Canadians, but multiculturalism does; therefore, it is of utmost importance that multiculturalism be included in subsection 2(1) within the accord.

1410

**Mr. Yee:** I think also, because section 2 refers to Quebec as a distinct society, that makes it especially important to include multiculturalism in section 2.

As I said, we do welcome Quebec's participation in the Constitution, but we do have some concerns about the reference to Quebec as a distinct society and the affirmation of the role of the Quebec government basically to implement that concept of Quebec as a distinct society. Does that mean, for example, that heritage-language programs may suffer in Quebec or may never come into being? I know currently in Ontario, and especially within Metro Toronto, Scarborough in particular, there is very much debate about heritage-language programs. Does Quebec as a distinct society leave any room for heritage-language programs?

I think the concept of multiculturalism has to be in section 2 and not mentioned in section 16 of the amendment act because the reference to a distinct society may well lead to predominance over multiculturalism. Just as bilingualism is seen as a fundamental characteristic of Canada, so too should multiculturalism.

I also want to address the point of immigration. As I said, in our past, Chinese Canadians have suffered from a lot of discriminatory immigration legislation. The first attempts were made by the British Columbia government and were struck down based on division of powers, not based on any civil rights argument. Those arguments were not legally available at that time.

The federal government later passed its own discriminatory legislation, but I think we realize that there is more danger in the provinces wanting to address their own needs, their own concerns, and pushing for immigration policies which may not be in accord with national policies or which may in effect be discriminatory—perhaps not blatantly in this day and age but certainly more subtly.

If more power is given to the provinces to choose immigration policies, to enter into agreements with the federal government, will we see some kind of checkerboarding across Canada of immigration policies? The same with immigrant settlement assistance, will we see checkerboarding there as well? There is a view of Canada which can be promoted through immigrant settlement assistance. I am not sure that you can rely on each province to have its own policies. The settlement services in Quebec, that provision refers to linguistic and cultural aspects. Again, what happens to multiculturalism within this kind of framework?

There is a reference in the Constitution Amendment Act, I guess, to federal paramountcy. It talks about national objectives, but I think the federal paramountcy test is very narrow. Repugnancy is the basic aspect of that test. I think that gives a lot of scope for provincial immigration policies to differ very much across the country and still not be repugnant to any particular federal legislation.

Perhaps in summary, look at the way the accord is drawn up and look at the sections which talk about the charter. For example, section 95B says the charter applies to any immigration agreement. Why does the charter apply to an immigration agreement? Why is there specific mention of that in section 95B and no specific mention of the whole charter applying to the Meech Lake accord or to the amendment act? Why limit the application of the whole charter to just immigration agreements?

Then section 16 of the amendment act refers to nothing in section 2 affecting section 25 or section 27 of the charter, and other sections as well. Again, why mention just some sections? Why put it in section 16? Why is that not part of

section 2? Why should not multiculturalism, the charter or the equality provisions be integral parts of section 2 and not just an afterthought?

I think the reference to section 27, which is the multiculturalism provision in section 16, is an afterthought. It is almost like a response to an irritant. I do not think the state of the nation is such that multiculturalism should be seen as an irritant or should be seen as an afterthought. I think the nature of the constitutional amendment reflects that in the way it is drawn up. It is a fundamental flaw. It has to be an integral part of the act and not just an afterthought.

**Mr. Chairman:** Thank you very much for your submission. You have touched on a number of issues, some of which we have had raised before, but again I think your perspective will give us some different insight as well into some of these issues. We will begin the questioning with Mr. Cordiano.

**Mr. Cordiano:** Thank you for your brief. You have certainly touched on a number of areas which we have been deliberating on in this committee and we have heard from a number of people. I will not attempt to cover all the areas with you, but I just want to ask your opinion of section 16 and hear what you have to say with regard to that.

With respect to the charter, I have asked other witnesses this question and I am going to continue to ask it because there does not seem to be consensus. I have a great deal of sympathy with the way in which you view the concept of multiculturalism. Certainly, I would agree with the basic premise that you put forward.

Having said that, I think one has to look at the charter and, following from the legal and constitutional experts who have come before the committee and certainly other observers of the Constitution and constitutional matters, looking at section 27, they have all basically said that section 27 of the charter is an interpretative clause. Indeed, it does not grant rights. There are no multicultural rights *per se*. It is not a rights-granting section or clause. We have this interpretative clause in the charter, which in effect the Meech Lake accord attempts to drive back in, so that there is no dispute about the intention here. Basically, that has been the explanation that has been given to me, and I think some others on this committee will share that.

I just take you back to 1982 when section 27 and the clause dealing with multiculturalism were put in. There are certainly no other rights that have been granted to multiculturalism. The charter speaks to linguistic rights and it speaks to

denominational rights in respect of separate schools. It speaks to a number of other equality rights, but it does not speak to multicultural rights. It is only an interpretative clause. I just want to get your views on that.

**Mr. Yee:** Right. I think there are two brief points here. One is that even though section 27 may be just an interpretative clause, section 1 of the charter is extremely important in terms of reasonable limits and what is demonstrable in a free and democratic society. Section 27 is very useful under a section 1 analysis. I think even though it may not grant substantive rights, it has more importance than it may appear.

**Mr. Cordiano:** I was not implying that it is not important. I am just saying it is not a rights-granting section. In some of the legal jargon that has been used, that has been indicated.

1420

**Mr. Yee:** Right. But that is no reason not to put it within section 2. In fact, that is my second point, that section 16 may be worded incorrectly. Maybe it should be the other way around: not that section 2 does not affect section 27, but perhaps section 27 should be used in the interpretation of section 2. Nowhere does it say that section 27 applies to the Constitution Amendment Act.

**Mr. Cordiano:** That brings me to my next point about section 2 of the Meech Lake accord, respecting the fact that it speaks to subsection 2(1a), linguistic considerations; that is, that we have French-speaking Canadians in Quebec and English-speaking Canadians outside Quebec, but not centred exclusively and vice versa, and that this in fact "constitutes a fundamental characteristic of Canada." What it says here is that it is one of the fundamental characteristics; it is not exclusively the only characteristic of this country.

We are getting into language, but we have to deal with the language and the words that are being used. We will have a number of interpretations on what these words mean. The charter is like that. Expressions about "a free and democratic society" are left to interpretation. What does that mean? What are the limitations on that? What do all of these glowing statements mean exactly to a free and democratic society? That is left to some interpretation by the legislators in the various assemblies and in the House of Commons. It is left to legislation. There are a number of things that are not mentioned in the Constitution which we deal with by means of legislation.



**Mr. Yee:** It is true that it says "a fundamental characteristic" and not "the fundamental characteristic." There are many fundamental characteristics of Canada, but where the fundamental characteristic identified refers to something linguistic, something cultural, I think it is a fundamental flaw not to refer to additional fundamental characteristics along the same lines, such as multiculturalism.

**Mr. Cordiano:** Certainly, it has been suggested as well that what constitutes Quebec makes it distinct, but part of that distinctness is the fact that we do have present in Quebec an English minority and a number of other ethnic groups. That certainly is the makeup of Quebec today. So when the courts are looking at this, it has been suggested that they also have to take into consideration those fundamental elements in Quebec society. Indeed, it would be part of the overall interpretation.

**Mr. Allen:** I appreciate your coming before us. I think it is critically important for us in this committee to listen with as open ears as we can to those groups in particular in the country at large who feel that in some way or other any of our constitutional or legal arrangements somehow exclude them or put them to one side or compromise their existence here. I may say I remember very well the university and education-based issues that gave rise to your own lobby group.

Like yourself, we are trying to determine whether in fact this accord does have the negative impacts that some of us fear it might have or whether it does not, and whether our fears are well-founded or whether they are ill-founded.

Let me ask you for starters, does it make any difference for you with respect to your interpretation of the "distinct society" clause and its implication for other minority groups to know that the Quebec Charter of Human Rights and Freedoms has a statement in section 43 that is much stronger than the statement in the Charter of Rights and Freedoms of 1982? It reads, "Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group."

It is not an interpretative clause. It does not say anything that goes on under this document should not impact adversely on those things. It says there is a positive right there. To the best of my knowledge, that is about as straightforward a statement of that right as exists in any similar document across the country.

Does that kind of information relieve your mind on that subject or does your concern go

beyond that as an assertion and a governing principle in Quebec?

**Mr. Yee:** I think it does go beyond that. Although we applaud Quebec for that clause, it is not a constitutional provision. There are many very high sounding pieces of legislation. We are not suggesting that Quebec is not implementing it or anything, but to see the words there on a piece of provincial legislation does not have the same impact as would the words in the Canadian Constitution.

With respect to trying to assess whether this accord has any negative impact, I am not sure that is the test. You know the old saying about justice not only being done but being seen to be done. In the courts of law, this accord may not have any negative effect on multiculturalism. That may be so; I do not know. But if it means that the concept that Canada embodied in the Constitution is one which concerns a lot of people, I think that issue has to be addressed, aside from the substantive impact.

**Mr. Allen:** When we deal with constitutional issues, a lot of structures and elements of Canadian life get very much set to one side. Inasmuch as the Constitution tends to deal with the relationships between established political entities like provincial governments, territories, the federal government and their direct and immediate agencies, it would be a major step for us to create something in the Constitution called a council of nationalities or a senate that was based on the multicultural phenomenon of Canada, for example. To take that step would be to move your concerns much more to the centre of the constitutional debate.

Without that, it is difficult for me to see what the status of heritage languages is in the Constitution as distinct from the politics that go on within it and between peoples and groups.

I am asking you whether your sense is that down the road there is a possibility that there would be more than two official languages or that there would be a constitutional entity in Canada that would formally and properly represent the multicultural makeup of the country. With that objective in view, one could begin to focus the debate a little bit more exactly, if you see what I am getting at.

**Mr. Yee:** You may well be suggesting something new that has never occurred to us. Frankly, we are not asking for heritage languages to be entrenched in the Constitution. We are merely asking for the prevention of the entrenchment of something that could be adverse to the implementation of heritage languages.

**Mr. Allen:** The implication in vesting groups with other language traditions in 2(1) and 2(1a), the "distinct society" provision and the duality clause, is really in effect to give them status as official languages.

**Mr. Yee:** I would disagree with that. I am sure there could be some adequate wording that reflects bilingualism but multiculturalism. I think within the bilingual framework there is ample room for heritage-language programs where the numbers warrant.

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**Mr. Allen:** For example, the phrasing in 2(1a) is specifically with respect to the language groups. One assumes, therefore, that 2 and 3 relate to preserving characteristics around that form of dualism. Those are both official language groups in Canada. I concede there would be some role for another kind of statement or another section that would address multiculturalism, but not that one.

**Mr. Yee:** You may be right on that count.

**Mr. Allen:** I am just trying to refine where we move and how we move on those concerns in the context of this document. I think we need to give a little bit more thought to just where that should be so as to avoid some of the objections we are going to get down the road if we start talking about putting it in the wrong place, because the implication would be there.

**Mr. Yee:** Yes, I see.

**Mr. Offer:** Thank you very much for your presentation. I will just ask a few short questions. Dealing with opting out, I listened very carefully to what you indicated in your submission, and I want to get a clarification. You are, I would suggest, aware that the whole question of section 106A applies solely to areas exclusively within provincial jurisdiction. Having said that, in fairness, we have heard concerns with respect to section 106A, but we have also heard that in this country, in these years, section 106A does entrench the right of the federal government to initiate national programs with national objectives in areas of exclusive provincial jurisdiction. Maybe that is not such a bad idea.

Second, this particular section will allow provinces to opt out, as you have indicated, and to receive compensation if they institute their own programs meeting those objectives. What follows is the suggestion that the country as it evolves with respect to these programs is very different and maybe an initiative that Ontario starts might be somewhat different from one that Alberta or British Columbia starts, but it would

allow the provinces to meet the particular realities of their province and to deal with needs and realities.

My question to you is, where is the concern in giving, first, the federal government the clear right and, second, the ability of the provinces to opt out in those circumstances?

**Mr. Yee:** This is perhaps getting more into a personal view. Everyone has his own view of how centralist Canada should be or how decentralized it should be. I think it would be safe to say that, in general, we in the organization are not looking for federal control of all these programs, but there are certain programs where we would support national standards. These would not necessarily be very detailed standards but perhaps just minimum standards, which would still give the provinces the freedom to tailor to local conditions.

**Mr. Offer:** I understand what you are saying, but section 106A talks about those areas which are now within provincial jurisdiction, not making any change as to what is within provincial or federal jurisdiction. We are talking about that which is now in existence and has been, in many ways, since 1867. In those cases, we are saying, yes, the federal government is going to be given that constitutional right to get into this area, but we are going to give the provinces the flexibility to meet the realities of their particular province.

From your response, I am not hearing that you are necessarily against the section, as opposed to maybe dealing with whether the provinces should have that right, which was in many ways decided in 1867.

**Mr. Yee:** Except that as a matter of reality the federal government does not need the constitutional amendment to get into those areas. If it controls the purse-strings, it can get into those areas. What this entrenches is a right for provinces to take federal money for programs which may not necessarily meet national standards.

There is a reference to national objectives, but that is rather vague, I would suggest. I am not sure it gives the federal government anything, because the federal government can do it anyway, through its money, and this just talks about money. If it does give the additional power of the federal government being able to initiate its own programs, not on a joint basis with the provinces, I guess I do not really have any policy opinion on that.

Our concern is that this could detract from the establishment of national standards in some areas



where we believe national standards would be helpful.

**Mr. Offer:** I think we are somewhat at an impasse because I still seem to work on the basis that the province has jurisdiction over certain areas and the federal government has jurisdiction over certain areas. Section 106 talks only about areas where the province, not the feds, has jurisdiction, and clarifying that the feds have the right to introduce cost-sharing agreements with the province but also giving the right to the province, because it is in an area of exclusive provincial jurisdiction, to say, "Yes, we understand and we like those national objectives, but this is how we should deal with them in Ontario," and Alberta should be able to do that in Alberta, in a more sensitive fashion, meeting the needs of each particular province.

**Mr. Yee:** I think that sensitive fashion can exist without this section, that the federal government will just impose minimum standards and allow for the tailoring at the provincial level. What this section gives is the right to compensation, which was not there before. In effect, it curtails the use of federal spending power to control joint programs. Currently, without this section, there is no curtailment of the federal spending power. If the federal government wants to say, "We will give you \$2 million if you implement this program," the province cannot opt out. So this does have an effect on federal attempts to use its spending power.

Now that is another policy question: Should the federal government have that kind of spending power for exclusive provincial matters?

**Mr. Offer:** We are getting into some debate, but I have one short question. You indicate that matters of immigration should be under the jurisdiction of the federal government. We have been told that matters of immigration have been of concurrent jurisdiction to both federal and provincial and that has been in existence since 1867. Are you suggesting that is where the change ought to be made, because that is outside this agreement? The distinction between federal and provincial powers and the concurrent jurisdiction with respect to immigration is not dealt with in this agreement but many years earlier.

**Mr. Yee:** It may well be true that is a change that should be made as well, but I think the references to immigration in this amendment further weaken the federal power over immigration, which we do support as a national standard.

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**Mr. Chairman:** Mr. Sterling has a question but I wanted to ask something on immigration, so perhaps I could follow up here. Could it not be argued, though, that all this accord does in terms of immigration is recognize the existing agreements, in effect, the six agreements which the federal government has with the provinces?

I guess one of the things we are wrestling with as a committee is trying to determine what are some of the very clear areas where we can see where some significant change has been brought about. One might argue whether you need that in a constitution. One could say, "If they have been making agreements, why do you need that in the Constitution?" None the less, if it reflects simply practice as we now know it, then it may not be harmful.

As I read this and I look at the agreement that Ottawa has with Quebec and with five other provinces, they are all quite different. But it seems to me that built into that is protection—the reference to the charter to ensure that in fact a province cannot impose racial quotas, that mobility rights as set out in the charter still apply so that if you or I came into the country and went to British Columbia, we could go the next day to Alberta or wherever. I am not clear, and I guess my reading of that to this point says it is a moot point whether it should be there at all, but all it does is reflect the status quo.

**Mr. Yee:** If indeed that is all it does, then we would not want the status quo entrenched.

**Mr. Chairman:** Which is a valid point. I accept that.

**Mr. Yee:** And we are pleased that the charter—

**Mr. Sterling:** My point is in the same area. I do not agree that this is the status quo, because there is a significant difference. Under our present Constitution, provinces have the right to make laws in relation to immigration provided they are not going against federal legislation. So the federal Parliament can say: "Ontario, you have legislated wrongly; we will legislate in the exact opposite direction, and therefore your legislation becomes null and void." That is what section 95 of our Constitution says now.

**Mr. Cordiano:** No, it does not.

**Mr. Sterling:** Yes, it does. I will read the section here because I think it is important. Section 95 of the Constitution says:

"In each province the Legislature may make laws in relation...to immigration into the province"—

**Mr. Chairman:** Can I just note for the record that is from the British North America Act, section 95.

**Mr. Sterling:**—"and it is hereby declared that the Parliament of Canada may from time to time make laws in relation...to immigration into all or any of the provinces; and any law of the Legislature of a province relative...to immigration"—I am trying to leave out another part of it relating to agriculture—"shall have effect in and for the province as long and as far only as it is not repugnant to any act of the Parliament of Canada."

This does something very much different. What it does under the accord, section 95C, is it allows a province and a federal government to get into an agreement, and that agreement can only be upset if both the government and a Legislature decide to upset it. So you could have, in effect, one government today make a deal with one province and then the next Parliament of Canada could not withdraw out of that deal. In effect, that is what this accord says.

You could have an immigration policy in Quebec or in Ontario or whatever which would really become part of the Constitution and it would be really irreversible as long as the province wanted to hold that card in its hand for ever and ever. I think there is a great danger in that, in that you are taking away from the Parliament of Canada the future power to make and change immigration policy. I think there is a real concern there. I would very much agree that the status quo is fine and dandy, but the accord is not the status quo as far as I can read it, as a lawyer.

**Mr. Yee:** I share your concerns on that.

**Mr. Chairman:** It is perhaps something we are going to have to look at in more detail. One might argue that subsection 95B(2) of the accord restates what is there. I guess the other point is just that there is a perception that you have, at the very least, that somehow that does change the rules of the game and therefore you are concerned about what might flow from that. Would that be a fair statement?

**Mr. Yee:** Yes.

**Mr. Chairman:** Mr. Sterling, do you have another question?

**Mr. Sterling:** No. I just wanted to point that out because I think it is a very important point. I think it also points to the fact that on questions of confusion, some of the members of this committee have felt that there should be a reference on some of those questions to make it clear what in fact the intent of the document is. That is the point I wished to raise.

**Mr. Chairman:** Thank you very much for coming this afternoon, for presenting your paper and for helping us through some of the questions as we try to find our way through the accord. We very much appreciate it.

**Mr. Yee:** Thank you.

**Mr. Chairman:** I would now ask the representatives from the Ontario March of Dimes, Toronto chapter, if they would be good enough to come to the table: Randall Pearce, the director of public affairs, and Joel Olanow of the board of directors. I believe that somewhere there is a brief which has been passed out. If you would like to proceed in whatever fashion you wish to present your submission, then we will follow it up with questions.

#### ONTARIO MARCH OF DIMES

**Mr. Olanow:** My name is Joel Olanow, and I am a member of the board of directors of the Ontario March of Dimes. On behalf of my organization, I would like to start this afternoon's presentation by thanking the select committee on constitutional reform for providing us with this opportunity to meet with you.

The Ontario March of Dimes came into existence in 1949, originally under the name of the Ontario Poliomyelitis Foundation. Originally Ontario-based only, within two years we had become a national organization and by 1956 our current name came into being.

Our original objective was to beat polio. With the development of the Salk vaccine in the mid-1950s, this dream had become a reality by the early 1960s. New cases of polio after 1960 were all but eradicated. Once this had been accomplished, the Ontario March of Dimes did not choose to become a vestigial organization. Rather, our mandate was broadened to assist all physically disabled adults living in Ontario. Our objective is to assist these individuals so that they can live a meaningful and dignified life.

Stemming from this mandate, the Ontario March of Dimes is active in communities right across Ontario, 16 in all. Every year, thousands of volunteers assist us in serving adults with physical disabilities. Over the past 10 years, we estimate that over 100,000 volunteers have given freely of themselves to give hope to over 700,000 physically disabled adults who live in our province.

Through our regional offices, we provide a number of important programs including, among others, the provision of assistive devices, be they wheelchairs, canes, crutches, artificial limbs—in short, adaptive equipment of all kinds to



maximize the independence and mobility of disabled persons.

We provide community services. We have a skilled staff who organize group action, consult on issues and initiatives in areas as important as housing, attendant care, human rights, transportation, public awareness and public education.

We provide a camping program for the severely disabled, an opportunity for individuals who are confined to institutions permanently and require 24-hour attendant care to have an opportunity to spend a few weeks in a recreational setting without compromising their care requirements.

We provide vocational rehabilitation through 11 centres throughout the province to provide work assessment, training and placement counselling. We offer microcomputer training, offering many severely disabled their greatest opportunity to communicate, to learn a job skill, to provide them with an educational and entertainment forum using the most up-to-date software programs.

We also have a post-polio program designed to assist those who had the disease many years ago and are dealing with recurring symptoms which we now recognize may occur in old age.

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As mentioned, we work with thousands of disabled individuals every year. Over half are forced to live on less than \$10,000 annually. Only one in 10 enjoys the luxury of living on a budget of more than \$15,000 a year. Our goal is simple: to provide basic yet fundamentally important assistance so that disabled persons can contribute as active and independent individuals throughout a society which also belongs to them.

Ours is a voluntary agency, and the brief we are about to present was prepared by volunteers. I regret that none of the members of the committee that prepared the report are able to present their findings to you this afternoon. However, I would like to introduce Randall Pearce, director of public affairs for the March of Dimes, to present the highlights of our committee's review. Before Mr. Pearce takes over, I would like to thank you once again and express our sincere wish that you will listen to our views and give them their due consideration as constitutional reform progresses.

**Mr. Pearce:** I would like to join Mr. Olanow in thanking the committee for this opportunity to present the position of the Ontario March of Dimes on the status of constitutional reform as it is impacted by the Constitution Amendment, 1987, or the Meech Lake accord.

The purpose of a constitution, as noted by Professor A. W. Johnson, is to proclaim and define nationhood, to proclaim and define the rights and freedoms of the citizens of the nation, and to establish a system of governance which will contribute to the flourishing of the nation, its citizens and its identities, and in the doing of it to strengthen the bonds of nationhood.

The great accomplishment of the Meech Lake accord is in its contribution to the flourishing of Canada's identities by reintegrating the province of Quebec into the constitutional family and by affording our French culture a special status. The Ontario March of Dimes joins the many groups and individual Canadians in welcoming Quebec's return to the constitutional fold. However, the Ontario March of Dimes is concerned that the Meech Lake accord, as it now stands, may be at cross purposes with the constitutional mandate. We are concerned that the agreement may negatively impact upon the equality rights of certain citizens and diminish the ability of the federal government to nurture strong bonds of nationhood by limiting the efficacy of federal spending powers.

In so far as the Constitution Amendment, 1987 proclaims and defines the rights and freedoms of some Canadians, it calls into question the status and rights and freedoms of other Canadians. The Ontario March of Dimes is concerned that the rights and freedoms of the disabled citizens of this province shall be called into question by the courts if the present act is given passage without amendment.

The struggle for constitutionally entrenched freedom from discrimination for disabled persons is well documented. As a result of the hearings held across Canada in the summer of 1980, the Harp-Joyal committee firmly established that physically disabled persons are regularly victimized by intentional and unintentional acts of discrimination.

The battle for the inclusion of equality rights for disabled persons in section 15 of the Charter of Rights and Freedoms was not easily won. The government has consistently shown reticence to view disabled persons as deserving of the same standard of equality rights as other disadvantaged groups. Once again, through the Meech Lake accord, the constitutional debate has ignored the precious equality rights of disabled persons. The Ontario March of Dimes believes it must be eternally vigilant to safeguard those rights.

We are concerned that section 16 of the Constitution Amendment, 1987 may possibly be interpreted so as to limit equality rights in some

way. By setting out a principle of interpretation which says that multicultural and aboriginal rights are not affected by the new section 2 provisions—recognition of (a) the English and French cultures as a fundamental characteristic of Canada and (b) Quebec as a distinct society—the basis is laid for a potential legal argument that other individual rights guaranteed by the charter, including equality rights, are affected. It is not possible to determine what effect such an argument might have in a future court case. We can only say that such an argument might be made.

We therefore recommend that the Constitution Amendment, 1987 be amended through consultation between the federal government and the provinces to ensure that equality rights and other individual rights currently guaranteed by the charter not be diminished. We do not believe that the intent of the new accord was to diminish these rights, but we are concerned that the language chosen might have this effect, depending upon the context in which a constitutional case arises.

The failure of the federal and provincial governments to respond to the concerns of many organizations across Canada regarding this possibility has only served to heighten these concerns. If equality rights and other individual rights currently protected by the charter are not affected, why not say so in the language of the agreement?

The Ontario March of Dimes joins the Income Maintenance for the Handicapped Co-ordinating Group and the Coalition of Provincial Organizations of the Handicapped in voicing concern over the conspicuous absence of clear language regarding the equality rights of disabled persons.

The purpose of a constitution, to return to Professor Johnson's definition, is not only to proclaim and define the rights and freedoms of the citizens but also to strengthen the bonds of nationhood. The true expression of these bonds of nationhood lay in the programs which might have been established or made national in scope as a result of the spending powers of the national or federal government.

The Ontario March of Dimes believes that the Constitution Amendment, 1987, if passed unamended, may seriously impair the ability of the Constitution to foster strong bonds of nationhood by altering the spending powers of the federal government. Furthermore, we believe that, as a group, persons with disabilities rely on these national programs to a disproportionate extent and may suffer loss of benefits under the proposed constitutional amendment.

The federal government plays by far the largest role at present in the income security area, comprising both social insurance and income supports. The government of Canada administers and funds old age security and the guaranteed income supplement, unemployment insurance, family allowances, the Canada pension plan and 50 per cent of social assistance through the Canada assistance plan. The provinces administer and fund the other 50 per cent of social assistance, workers' compensation, additional income supplements for seniors and other comparatively smaller programs.

The federal share of financing for income security programs has remained near the 85 per cent level for the past two decades. As well, the federal government is largely responsible for income taxation, which includes several deductions, exemptions and credits that are really part of the support income program. If the picture is taken in total, the federal role in income security is much greater than the provincial role.

The provision in the Constitution Amendment, 1987 which directly affects income maintenance and support programs for persons with disabilities is section 7, which would add a new section 106A to the existing Constitution; it reads as follows:

"The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives."

The Ontario March of Dimes shares two different but overlapping concerns about this provision with the Income Maintenance Co-ordinating Group for the Handicapped: (a) a weakening of the federal role in national social programs and (b) a failure to establish a clearly defined and accountable model for federal-provincial co-operation in this area. Both of these concerns relate to the uncertainty of the language used in section 7 and to the differences or interpretation which can be expected to arise.

The Ontario March of Dimes has concerns with four terms used in section 106 of the Constitution Amendment, 1987.

1. Reasonable compensation: The government of Canada has produced a document entitled "Strengthening the Canadian Federation" on the constitutional reform, which says on this point, if the provincial program or initiative is compatible



with the national objectives, the province will get reasonable compensation; in effect, the money that the federal government would have contributed to the shared-cost program in that province. So the federal government seems to interpret reasonable compensation as equal compensation, but a court may take a different view. Section 106A also leaves open the question whether there can be a federal deduction where the nonparticipating province falls short of the national objectives in some way.

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2. National shared-cost programs: What is a shared-cost program? Is it confined to conditional grant programs such as the Canada assistance plan, or does it also include block-funded programs such as those covered by established programs financing or programs where there is an effective but not explicit provincial contribution such as is the case with deductions, exemptions and credits under the Income Tax Act?

3. Initiatives: While "program" in section 7 clearly denotes public sector involvement, "initiative" does not. "Initiative" suggests that provinces may pursue policies through means other than government programs, so that as long as those initiatives meet the objectives of the national shared-cost program federal funding will be available.

The use of the word "initiative" suggests that instruments which are quite diverse may qualify under section 106A. These instruments may vary greatly. To use employment equity for disabled persons as an example, provinces might simply ask that employers follow employment equity recommendations. They might also offer tax incentives to affirmative action employers or just launch an advertising campaign which encourages employment for persons with disabilities.

It could be that none of the policies would satisfy the desired standards of the national shared-cost program, yet they could be policy initiatives that could be compatible with the objectives behind the federal objective. Provinces which adopted any one of the above strategies would therefore qualify for federal compensation. The Ontario March of Dimes is concerned that this will lead to nothing more than a patchwork of social programs with very little in common.

4. Compatible: It is unclear within the present text of the Meech Lake accord what standards will be used to evaluate which initiatives are compatible with the national objective. It is true that in English the word "compatible" may mean

"accordant, consistent, congruous," but it is also true that it may mean "capable of existing together." In fact, the only meaning of "compatible" in the French language is "capable of existing together."

The Ontario March of Dimes is concerned that the citizens of this province with disabilities will have no assurances from the federal government that the provincial program following a national objective will resemble that objective in any way.

In respect of the foregoing, the Ontario March of Dimes submits the following recommendations to the Premier's select committee on constitutional reform for its consideration:

1. That nothing in the Constitution Amendment, 1987, affect section 15 of the Constitution Act, 1982.

2. That the words "or initiative" be deleted from section 106A of section 7 of the Constitution Amendment, 1987.

3. That all cost-shared programs for which provincial governments receive reasonable compensation from the federal government are deemed to be reviewable by the Charter of Rights and Freedoms.

4. That section 7 of the Constitution Amendment, 1987, be amended to ensure that it contains wording which clearly points the federal government to attach conditions which will entitle Canadians to at least some federally prescribed minimum conditions of access and quality of service for cost-shared programs before reasonable compensation is received by a province.

We hope that these recommendations, in addition to our written submission, will be of use to you in proposing amendments to the Constitution Amendment, 1987 that will be agreeable to the federal government and to all of the provinces.

**Mr. Chairman:** Thanks very much for that summary of your presentation and also for the specific recommendations. I wonder, just for the record, if I could correct one point. I think there were two references to this being the Premier's select committee and I do need to underline that this is a select committee of the Legislature and not of the Premier (Mr. Peterson). I think there is an important distinction to be made there which—

**Mr. Sterling:** I will go along with that.

**Mr. Chairman:** Thank you. I knew Mr. Sterling would—

**Mr. Breaugh:** That remains to be seen.

**Mr. Pearce:** Our apologies, Mr. Chairman.

**Mr. Chairman:** That is quite all right.

**Mr. Breaugh:** They may be more right than you are.

**Mr. Chairman:** We will begin the questioning with Mr. Breaugh.

**Mr. Breaugh:** As hard as it may seem to most Canadians, this really is the first opportunity where the public at large has had a chance to state their opinion and concerns about this. It may seem strange since it is almost a year since the accord was struck, but it is true. I think we are getting into areas where all of us are into new ground here, over the use of words and the placing of different parts and whether that has ramifications.

I would like to explore for a minute what I perceive to be a real concern and test the waters a little bit on some other things here. I want to make this distinction: my view is that everybody has said that nothing in this accord takes away any rights you have under the Charter of Rights. It does not seem to matter how many times people say that; it has no impact on the public at large because everybody comes back in here and says, "You took this word out of here or you mentioned this group and did not mention us."

Is it paramount that we attempt as best we can to nail that down? It may be by means of an amendment, although an amendment to this accord would also go to court and be subject to interpretation by a court later on; or it may be by means of a reference. But whatever the technique that is used, is your primary concern that you did not lose, or the people you represent did not lose, any of the rights that came in the charter in 1982 and that are just beginning now to get recognized through various court decisions? Is that your primary focus?

**Mr. Pearce:** That is certainly our primary focus with regard to equality rights. Perhaps what I should emphasize, though, is that it should be embodied within the language of the amendment. What first brought our attention to this matter was the difference between the draft text and the final text of the document. On May 28, the draft text came out without any of the equality groups or equality rights provisions mentioned. On June 3, lo and behold, we have aboriginal and multicultural rights included and disability rights or the rights of disabled persons conspicuously absent. So we feel that in a court of law there might be some ground for a justice to interpret that as meaning that the authors of the agreement had meant to impact negatively upon the rights of people with disabilities.

**Mr. Breaugh:** This might turn out to be the only occasion in the history of the free world when politicians have been accused of using too few words, because this one is certainly under attack for the words that are not there every bit as much as for the words that are there.

My concern, frankly, is that in basically all of what you have had to say, the general thrust of your argument is that if that is correct and the courts uphold that you did not have any of your rights from the charter removed by any of this your other problems are basically resolved, because it will be people going to court basically over a violation of their rights under the Canadian Charter of Rights that says, "This program in Newfoundland does not give me the same rights and freedoms as the program in Ontario." Somebody will challenge and go to court over that matter, but it all hangs on whether they actually have the legal right or not.

Some of this leads me to my final question, which is that I am a little concerned now that people have identified what they perceive to be a problem and then moved to draft a solution. We are beginning as a group to get some sense of how drafting a constitution and constitutional amendments is not quite as straightforward as you might have thought initially.

I am a little concerned, for example, that your fourth recommendation appears to me to say that until someone gets that one in hand and the federal government attaches conditions to a particular program and that is established in a court of law, no reasonable compensation is received by a province, because a literal reading of that fourth recommendation you have made really does say that until the courts have ruled that everybody's rights have been upheld no compensation can be received by a province.

What that would mean in practical political terms is that if Ontario wanted to do something this year and somebody decided to challenge that, three years from now when the Supreme Court is through with it, the program may or may not be approved but people will do without that service while the courts make their decision. I do not think that was your intention but that is what you said in the recommendation.

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**Mr. Pearce:** Taken literally, recommendation 4 does point in that direction. However, what we would really like to see included is more or less the yardstick, and have it embodied within the agreement so that it is not necessary to test every program in a court of law. Within the agreement there would be some standardized measure of



what will match up to the national objective, of what will qualify as an initiative, and then under what criteria compensation will be granted and what powers the federal power has to withhold compensation for a program which, frankly, does not come up to snuff.

**Mr. Breagh:** I will conclude on this. What I am concerned about a little bit now is that you view this from one perspective. I understand what you are trying to say, how you are trying to put your words together and how you are trying your best to ensure the people you represent are not diddled by this process.

The problem I have is that when we go to finalize something like this, I have to be mindful of all the other players out there. While you may see this as an opportunity to ensure that people who have some disability of some kind get proper programs from one end of the country to the other, there may well be another group out there that does not care about that at all; it is not its concern. But they may look at this kind of recommendation and say, "Boy, I wish they would put that in there because every time the government of one of the provinces decides to run a program and we do not like it, the way to do this and scuttle it is to challenge under this kind of provision before the Supreme Court of Canada."

I wish I was talking just theoretical politics here, but I am not. There are groups in Canada now that are using the Constitution of Canada to challenge, before the Supreme Court, programs of government, of trade unions, of universities and of schools. If the American experience holds true for us, and it probably will, under constitutional challenges almost everything that happens in society will sooner or later find its way before a Supreme Court judge. They will argue over the specific words that have been used in constitutional amendments to stop programs or to cause programs to be started. I am getting a little concerned that we do not mess up this process, that we understand what is important and secure those changes, in whatever format we can, and that we do not spend a whole lot of time muddying the waters with this kind of problem. Do you get the problem we are hung up on?

**Mr. Pearce:** I do understand your point. I am approaching it from another angle and saying: "Let us try to avoid any litigation or any cases before the Supreme Court. Let us try to set some guidelines that provinces will be mindful of when they are formulating programs so they do not run into this kind of challenge on an ongoing basis."

Let us take a national program, for example the Trans-Canada Highway that goes from coast

to coast; without nationally prescribed guidelines, perhaps Newfoundland can build a gravel road and Ontario will have a 10-lane freeway. That is the case, the road does narrow.

**Mr. Breagh:** I have been on that road and that is exactly what happens.

**Mr. Pearce:** It does narrow and broaden, but it should at least connect directly and all of that sort of thing; so that there would be a guideline for building that road and the purpose of the road remains the same as it goes from province to province. I do not think these are concerns that are particular to persons with disabilities. I think they do relate to all sorts of federal-provincial programs.

**Mr. Breagh:** To conclude, that is an interesting example you have chosen because it is probably one that makes the argument both ways. If you set a national standard for building a road and you say the road must follow that national standard from one end of the country to the other, you could not do it because of the different terrains you go through and the different climates you go through. The engineers will soon tell you that you cannot build the one standard, that you will have to build to a local standard so that when you go through northern Ontario, the roads will have to be built in a different way than they will through the southern part of the province. It is one of those occasions when you would have to apply different standards as you move through different terrains.

**Mr. Pearce:** I guess you would look at what is the purpose of the road. Those would be the guidelines you would set.

**Mr. Chairman:** In following along, there are two fundamental things, in a sense, that you have addressed this afternoon. One I call the equality aspects. I think that has come up on many occasions. It is certainly one of the compelling arguments that one must be concerned with if in any way, shape or form, the accord was going to affect charter rights.

On some of the other aspects of this accord, it is probably fair to say that different ones among us might say, "Do you really need that?" For example, maybe my personal preference with section 106A would be: "The feds and the provinces have always argued over shared-cost programs and always will. Why not just leave it out because we are going to be arguing." There is a political process regardless of the Constitution that is still going to be at play.

None the less, it is in there. I wonder if a number of the programs we may be concerned

about are not necessarily programs that are, in quotes, in exclusive provincial jurisdiction. You mentioned earlier a program relating to employment equity. One could argue from the federal government's perspective that there are all kinds of aspects of employment which are its area of concern, and that in negotiating a lot of those programs, section 106A would not apply, that it would be just the usual hard-boiled process of the governments getting together to try to hammer out an agreement of some sort or other.

It seems to me, though, that perhaps what is at the root of some of the provincial concerns that have led to section 106A being included, because I do not think it is just Quebec that had a concern about that, is that somehow there was an overriding unilateral right that the federal government could march into any area of provincial jurisdiction and simply, through its spending power, clobber the provinces into going along with the program whether it was needed or not in the view of that province.

I think we need to be careful in addressing that, keeping in mind that it is the provincial viewpoints and federal viewpoint through which we have come to delineate national programs and national standards in many areas, not simply in areas of exclusively provincial jurisdiction but in a whole series of other areas where we now have different kinds of shared-cost programs.

In terms of the thrust of some of the comments in the criticism of section 106A, I would be concerned that it is tending to lead us towards: "Whatever Big Daddy in Ottawa says, that is the way it must be. Only they are all seeing and all knowing in terms of the nature of that program." When one looks at a number of programs, especially in a variety of social service and employment-related areas, for the province which tends to be implementing a lot of those programs it is critical that it have a fundamental role at the table in determining those programs. In fact, there may be a very valid reason a province might wish to opt out because it is doing a program which it may perceive to be better or at least somewhat different because the needs of its population is somewhat different.

Would anything I have said be something that in principle you would object to or would you agree there is a key provincial role in those programs?

**Mr. Pearce:** It is very difficult for me to speak for my committee at this time.

**Mr. Chairman:** I was not—I do not mean to—

**Mr. Pearce:** I can perhaps make one comment. Perhaps section 106A has received the

attention it has received from our group and many other groups because once this amendment to the Constitution is passed, it becomes very difficult to reamend the Constitution. So Meech Lake, regardless of other matters of content, has received a great amount of criticism simply because people are saying: "This may be it. How do we change it and get unanimity after this thing is passed?" So it may be a disproportionate criticism that is surrounding section 106A.

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**Mr. Chairman:** This gets back sometimes, I think, to a fundamental Ontario reaction to a variety of problems whereby we tend to feel in this province, in a way that is quite different from people in other provinces, that Ottawa somehow is better, more important and should be doing more things; whereas as you move farther away from Ottawa, I think other provinces get very concerned about that kind of power. At the root of some of that concern is perhaps a valid principle that if we have a Constitution that says certain powers are provincial and certain powers are federal, do we easily accept that the federal government should be able to enter those provincial areas willy-nilly because it has the spending power?

I realize that some of this gets somewhat theoretical, but I think it does speak to some fairly basic elements of our confederation.

**Mr. Pearce:** I certainly cannot speak to the feelings of those people who live on either one of our coasts, but from the perspective of disabled persons I might say that there is a greater confidence in the federal government simply because of the strength of its spending power and the level of involvement in those areas which affect disabled people most significantly—that is certainly so in the income support area, that 85 per cent level of involvement which I mentioned earlier—that perhaps the federal government is better able to guarantee their interests.

**Mr. Chairman:** But that would not be affected by this, would it?

**Mr. Pearce:** What programs would be subject to it is a very unclear area right now. We could all of a sudden have provincial versions of all of these programs as proposed in the Meech Lake accord. It is difficult to know right now.

**Mr. Olanow:** I think one point we want to make very clear is that the recommendations we are providing are not intended to suggest that we are trying to say what proportion of power should be allocated centrally to a central government in Canada and which provincially. What we want to



ensure is that when those powers are so allocated, the population we are representing do not get caught in the cracks somewhere, as Ottawa and Toronto and Ottawa and every other capital city in Canada decide exactly which programs will be brought to bear and how they will be brought to bear.

We are talking about a sizeable portion of a national population, and yet a population that does not have a voice in direct proportion to its numbers. When we are talking about initiatives and needs, if you think back to basic psychology, Maslow's needs hierarchy, the people we represent are very low down on that scale, and the initiatives we are talking about are sometimes perceived in a more sophisticated, "self-actualizing" manner.

We are talking about survival for these people, and that is where the passion in this argument really lies. That is why it is so desperate to the people whom we are representing and the committee that wrote this report on their behalf that this be clear to us.

**Mr. Chairman:** I think that is a very important statement that we have seen in terms of a number of groups that have come before us: how people get left out, and whether it is by commission or simple omission does not really matter if you are the person who has been left out. If anything else has happened in these hearings, I think that point has been underlined. It was underlined this morning when the Persons United for Self-Help in Ontario organization was here and was making similar points in terms of being left out and therefore having to react after the fact to things which may very definitely affect the welfare of members.

**Mr. Elliot:** Can I ask a supplementary with respect to equality rights, Mr. Breaugh's first question? I got the flavour that, with respect to the development of the accord as it now stands, it might have been hindsight that you were quoting. If section 16 were not there, you might not be here today addressing the equality rights section.

**Mr. Pearce:** No. The Ontario March of Dimes has been consistently concerned with equality rights for disabled persons, and we are not simply making a constitutional argument here. I think we are making a very human argument, saying that in all aspects of legislation dealing with human rights, disabled persons should be included there; and yes, we would be here regardless of section 16.

**Mr. Elliot:** That is fine.

**Mr. Allen:** Could I just ask a question in that connection? The way you phrased it was that,

having noted that some groups were omitted from section 16—and I guess you were notably referring to women and the handicapped, which are the two other groups that have most consistently made this argument—you said that then the courts will ask why they were left out.

Of course, then some fairly eminent lawyers will tell the courts why they were left out, and the lawyers will say that they were left out because the sections that are included in section 16 are of an entirely different status in terms of their phrasing and their placement in the other documents, whether it is 1867 or 1982, and that the two that were included were not rights-conferring articles, they were simply interpretive clauses saying that other things in the Constitution, when it comes to interpretation, must be understood to be in conformity with a certain consideration of multiculturalism or of aboriginal rights.

The other two items that have been omitted, these lawyers will say, were substantive clauses. The one on male-female equality rights was a straight out assertion which included in itself at least a "notwithstanding" initial language which would appear to give it priority over many other things in the charter.

Second, the mentally and physically disabled references are in the equality section, which again is a straight, clear, definite and uncontroversial declaration of right which is not interpretive and which indeed has been a clause that, since coming into force, has been utilized as a measure of a good deal of other legislation. A lot of provincial and federal legislation has had to be amended in order to come into conformity with it, and therefore it is impossible to imagine that any court would act in such a way as to take another section of the Constitution and use it to undermine or diminish the equality rights that are referred thereto, notwithstanding the fact that total equality has not been achieved in Canadian society to date. What is your response to that line of argument?

**Mr. Pearce:** I certainly follow your line of argument.

**Mr. Allen:** It is not mine. This is what has been—

**Mr. Pearce:** Traditional, whatever, borrowed. I certainly follow that train of logic, and my response to it is: should we leave all of the loose ends? I certainly do not mean to overburden the Constitution with a lot of clauses, but can we not simply suggest, for example, our first recommendation, "Nothing in the Constitution Act, 1987, affects section 15 of the Constitution

Act, 1982," quite simply, and not leave it up to lawyers to argue the merits of the rights of disabled persons? And even though rights of disabled persons were not included in 1867 and were tangentially included in 1982, by the time we get to 1987, should they not be more in the forefront?

**Mr. Allen:** Tangentially?

**Mr. Pearce:** Well, you have certainly pointed out that they have a lesser stature than aboriginal or multicultural rights.

**Mr. Allen:** No, I did not. I indicated that they were in section 15, which was an absolute conferral of a basic right along with the other fundamental and more historic phrasing around race, national or ethnic origin, colour and religion. They have joined all of the classic definitions, defined groups against whom discrimination must not be waged.

1530

**Mr. Pearce:** Then perhaps we should just reference the entire amendment in 1987 to the Charter of Rights and Freedoms of 1982 and that would certainly solve our problem.

**Mr. Breugh:** Another convert, one by one, day by day.

**Mr. Chairman:** Thank you, gentlemen, very much. We really appreciate your dealing with our questions in a frank and open way. We are searching for some avenues, some routes, some ways of resolving a whole series of matters that seem to touch upon this accord, and we appreciate your presentation and appreciate your thoughts and comments. Thank you again.

**Mr. Pearce:** Thank you so much.

**Mr. Chairman:** If I might now call upon representatives of the Canadian Jewish Congress to come forward: Neil Finkelstein, a member of the constitutional subcommittee; Anne Bayefsky, also a member of the constitutional subcommittee; Eric Maldoff, again a member of the constitutional subcommittee; Les Scheininger, the national honorary legal counsel; Charles Zaionz, the chairman of the Canadian Jewish Congress, the Ontario region; and Manuel Prutschi, the national director of community relations. I hope I have named everyone who is here. We would like to thank you very much for coming. We have a copy of your brief.

**Mr. Breugh:** I think we have been outflanked.

**Mr. Chairman:** One might think we are making a presentation to your committee.

I am not sure who is going to act as the spokesperson, but perhaps whoever is could identify herself or himself and we will proceed with your presentation and follow it up with questions.

## CANADIAN JEWISH CONGRESS

**Mr. Zaionz:** Mr. Chairman, let me begin. I am Charles Zaionz, chairman of the Ontario region of the Canadian Jewish Congress. Let me thank you for receiving us today and thank the members of the committee.

I will not conduct introductions, since you already have, save to say that Mr. Maldoff is seated at the end of this table, Mr. Scheininger is off the end of the table and Mr. Finkelstein, Professor Bayefsky and our staff person, director of our joint community relations committee, Mr. Prutschi.

The Canadian Jewish Congress has for many years submitted briefs on those matters of concern to the Canadian community generally, and this is another instance where we feel that it is important for us to be present and to submit a brief.

I will not review for you the history or the aims or objectives of the Canadian Jewish Congress. They are included in the initial paragraphs of the presentation, and the biographies of the members of our constitutional subcommittee are included at the end. You can simply refer to them at your leisure.

I will turn the meeting over to Mr. Finkelstein, who will present the position of the Canadian Jewish Congress on the Meech Lake accord.

**Mr. Finkelstein:** Mr. Chairperson, honourable members, free and democratic principles are predicated upon majority rule, and that is that the majority elects our lawmakers in Parliament and, to the extent that the government retains the confidence of those elected members, the government remains in power. That principle is the cornerstone, one of the cornerstones, of our society.

At the same time, our free and democratic society recognizes that a government which is acceptable to the majority for its continuation has to be governed by safeguards to protect the minority. That is a major Canadian Jewish Congress concern, it is a major Canadian concern and it is there that the balance lies, the balance between majority rule, democratic rule and the protection of minorities.

Parliament and the provincial legislatures responded in 1982 by enacting a Charter of Rights to strike a balance. They retained both



levels of government, retained their jurisdiction generally, but with a withdrawal of power in certain narrow areas: in the areas of fundamental freedoms, in the areas of legal rights and in the areas of equality. In those areas, Parliament and the legislatures decided that the arbiter should be the courts.

Even there, even in the Charter of Rights, there were two great limits imposed in order to effect that balance. The first was section 1 of the charter, and I think that is very germane to the discussion we are going to have today. Section 1 of the charter provides that any infringement of a charter right is nevertheless saved if it is a reasonable limit, prescribed by law, which can be demonstrably justified in a free and democratic society. So if the majority, as represented by the crown in the usual case, can demonstrate that a restriction is reasonable and demonstrably justified, it will be saved; and to flip it around, if the crown cannot show that it is reasonable, if it is unreasonable or unjustifiable in a free and democratic society, only then can the court strike it down.

Parliament and the legislatures went further in striking the balance and they reserved to themselves the authority, pursuant to section 33, to override judicial decisions even if a court decided that an infringement was unreasonable or was unjustified. Pursuant to section 33, by simple enactment the Legislature can override a judicial decision about fundamental freedoms or legal rights or equality rights.

It is against that background that, in the Canadian Jewish Congress's submission, section 2 of the Meech Lake accord contains basic flaws. It is going to be our position that, far from not impacting upon charter rights, the Meech Lake accord, both in section 2 and in the provisions it has with respect to the appointment of judges, can have a serious impact upon charter rights, and we would disagree very strongly with those who take a contrary view.

First, section 2 does not speak of equality. It speaks of inequality; it speaks of linguistic minorities and majorities. It does not speak in terms of bilingualism; it speaks in terms of majorities and minorities distinguished by language.

The second thing that section 2 says is that it is the role of the Quebec government to preserve and promote—and I would highlight and underline the words “and promote”—Quebec's distinctiveness. That, in our submission, is a clear direction to the courts that it is Quebec's responsibility to preserve distinctiveness and that

that is a responsibility which can be preserved by unequal legislation.

I would give as one example the one that is always given, and that is the Quebec signs case, French-only signs. I would think that the Supreme Court of Canada may well strike down that provision. It has been struck down by the Quebec Court of Appeal, and I would suggest to this committee that there is a very good chance that, if the Meech Lake accord were in force at the moment, that would be a direction to the court to interpret section 1 of the charter, to interpret reasonableness in a constitutional sense, in accordance with the dictates of section 2. That is what section 2 is for. It is there to interpret the charter. It is there to interpret all of the Constitution. It is there to interpret section 1, and it is there to describe what reasonableness and demonstrable justification mean.

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In that connection, I would draw to your attention two provisions that I am sure have been brought to your attention on many occasions to date. The first is subsection 95B(3) of the Meech Lake accord, which is in section 3. Subsection 95B(3), the proposed amendment, says that the Canadian Charter of Rights and Freedoms applies in respect of any immigration agreement. What that indicates is that when the drafters of Meech Lake were drafting this, they knew how to protect the charter from the impact of provisions in here. They knew how to do it and they did it in subsection 95B(3). I would also direct you to section 16, which you were talking about with the previous presenters. Section 16 also indicates that when the drafters of Meech Lake wanted to protect the charter or certain parts of it, they knew how to do it.

It is that silence with respect to section 2 which indicates, and which I suggest the courts are going to take to heart; they are going to be interpreting section 2 and they are going to say if section 2 was not to affect charter rights, it would have said so. The Legislature said so in the immigration area and in section 16, but did not say so with respect to section 2. Accordingly, we apply section 2 to the fullest extent of its terms, that is that it goes to define the whole Constitution and it goes to define how you interpret the charter and it goes to define how you interpret section 1.

Essentially, we make three recommendations with respect to distinctiveness/duality. The first is at page 6 of the brief, that section 2 be amended to indicate that, as with immigration in section 95B, the role of the courts in interpreting and

applying the charter has not been altered or affected. That is the first recommendation; be explicit. If, as people say, section 2 is not to affect the charter, then let us say so.

The second recommendation is that section 16 be repealed and that clause 2(1)(a) be amended to add a nonexclusive list of fundamental characteristics. There is more than one fundamental characteristic in Canada. If what is already in clause 2(1)(a) is a fundamental characteristic, then let us list some of the others, like multiculturalism, which is in section 16, aboriginal rights, which is in section 16, equality rights of all Canadians and specifically women and other groups, which should be included and is not in section 16, and fundamental freedoms, which are a fundamental characteristic of Canada but are not included in section 16. They should be included in clause 2(1)(a).

Our third recommendation with respect to distinctiveness/duality is that subsection 2(2) should be amended to provide that all governments have the obligation to preserve and protect and promote this expanded list of fundamental characteristics.

The Canadian Jewish Congress makes submissions with respect to two other areas: the Supreme Court of Canada and immigration. The Supreme Court of Canada is the ultimate arbiter of social disputes settled through legal proceedings, so it is the ultimate arbiter of relations between governments and it is the ultimate arbiter of relations between government and individuals. It has particular responsibility for the charter.

In our submission, you cannot look at distinctiveness/duality without also looking at the Supreme Court of Canada appointment procedures. The Canadian Jewish Congress had no quarrel with the principle of provincial involvement in the nomination process. However, we do have grave concerns about the rigidity of the formula. Under this formula it is very possible that at some point, in fact it is likely, that at some point there will be confrontation and there may well be a deadlock. I am sure you have been told before that there is no requirement for a list of names. You can have a list of one name, and that can cause a deadlock or a confrontation.

Under the accord, the federal government can choose with respect to six of the seats from any of the provinces. There is a lot of flexibility there, but with respect to the three Quebec seats, as it is written at the moment the accord allows for the possibility of Quebec submitting a list of one

name, take it or leave it. Take it, confrontation; leave it, deadlock.

Our submission, as set out at page 16, is that all the provinces be allowed to nominate qualified candidates from all the provinces. Then the three judges from Quebec would have to be nominated from among the Quebec bar, but any province could nominate somebody from among the Quebec bar. That will give the process flexibility. If the concern is to have provincial input, this would allow for provincial input. If the concern is to prevent a deadlock, this will prevent a deadlock because if one province presents a list of one, the others will not. It also allows national input into a national institution.

Our second recommendation with respect to the Supreme Court of Canada is that there be a formal mechanism for breaking deadlocks. In our submission, if our first recommendation is accepted, it is highly unlikely that there will ever be a deadlock, but to provide for the possibility that there might be, we submit that there be a formal mechanism for breaking deadlocks.

The third area that we make submissions on is immigration, at page 21 and onwards. Under the Meech Lake accord, there is a possibility of 11 immigration departments, and this can delay immigration and delay the admission of refugees. Our recommendation is that there be a specific federal ability to expedite the entry of immigrants according to federal criteria, and that be made specific in the accord.

As well, there is a guarantee in the preamble that Quebec will receive a share of immigrants equal to a proportion of the total. That may have implications for federal power to set overall national immigration, and again we would suggest that there be explicit powers in the federal government to set national levels where there may be a conflict.

The third submission is with respect to something that is in the preamble. It is agreed that there will be a federal withdrawal in Quebec from the provision of reception and integration services. This can lead, in our submission, to a generation of provincial rather than Canadian identity and an uneven provision of services in the provinces, so our submission is that the federal government retain its past role in providing reception and immigration services.

Our last submission with regard to immigration is, as we understand it the Cullen-Couture agreement is a narrow set of principles and that a wider set of principles be promulgated.

Subject to any questions you have, that is a synopsis of our brief.



**Mr. Chairman:** Thank you very much. I can assure you that we will have some questions. That was very thorough. I know you have summarized the major points, and we thank you for the brief itself which we can look at in more detail. I will begin the questioning with Mr. Offer.

**Mr. Offer:** Thank you very much for your presentation. I must confess it goes into a great deal of complexity with respect to the agreement, and on the basis of that I have a couple of questions. I have seen the summary, and I was wondering if you might be able to help me with respect to your summation points 2 and 4. The reason I ask for help in that respect is because in your summary point 2, you seem to be couching section 2 in terms of a rights-giving section, whereas in your summary point 4, section 2 seems to be couched in terms of its being of an interpretative nature.

Of course—and I know you have touched upon this—we have heard submissions by others, for instance by Professor Hogg who has indicated that section 16, in dealing with sections 25 and 27, is dealing with sections of an interpretative nature. Section 2 is also of an interpretative nature and not of a substantive or rights-giving nature. I am trying from your presentation to come to grips with your summation points 2 and 4, one of which seems to say that section 2 is an interpretative clause and the other that it is of a rights-giving nature. I am wondering if you can expand upon that.

1550

**Mr. Finkelstein:** Yes; let me do it as simply as possible. Section 2 is an interpretative clause, but that does not mean that it is not substantive as well, because an interpretative clause provides that you interpret something.

If the charter sets out rights—freedom of expression, equality guarantees and legal rights—and then section 1 provides that those rights may be limited by reasonable limits, and section 2 goes to interpret what “reasonable limits” means and expands those limits so that section 1 will save more infringements of rights having regard to section 2, then what you have done by interpretation is you have cut back on rights, because section 2, as we read it, says, “Give more weight to legislative judgements.”

In saying that, you are cutting back on the protection of section 1 in the charter because the impact of section 2 will be that those rights will interpret more narrowly what the Legislature does and the deference to the Legislature will be greater.

**Mr. Offer:** You are suggesting, obviously, that section 2 is an interpretative clause or provision.

**Mr. Finkelstein:** That is right.

**Mr. Offer:** Are you suggesting that sections 25 and 27 might also be looked upon as interpretative clauses, not of the charter? Are they also of an interpretative nature?

**Mr. Finkelstein:** Section 27 on its face says that the charter is to be interpreted in accordance with multicultural principles.

**Mr. Offer:** The reason I ask that is that, again with respect to your summary, you ask that clause 2(1)(a) be amended to add a nonexclusive list.

**Mr. Finkelstein:** Yes.

**Mr. Offer:** I am wondering if you can carry on with that suggestion because, of course, we are hearing from a number of groups that are saying, “Well, no matter what we talk about, how we determine what section 16 is or how section 2 is to be used, we think that we should be added in section 16.” I am wondering how this nonexclusive list could be phrased in terms of a Constitution, in terms of an amendment.

**Mr. Finkelstein:** It is done all the time. If you look at the opening words of section 91, for example, it says effectively that Parliament shall have power to “make laws for the peace, order, and good government of Canada” and “not so as to restrict the generality,” and what follows is a list.

With respect to the charter, in the BC motor vehicle reference, Mr. Justice Lamer said that the legal rights in sections 8 through 14 could simply have been followed upon section 7 as a nonexclusive list, “The following are protected,” and “notwithstanding the generality,” etc., and what follows is that list. That could certainly be done.

I think Ms. Bayefsky has some additional comments.

**Ms. Bayefsky:** If I might go back to your first question, I think it is overly simplistic to say that section 2 is simply an interpretative provision. I think you can interpret the Ontario separate school funding case to say that there are certain substantive results which are possible as a result of section 2 of Meech Lake.

Without going into a great deal of detail, there were two possible ways the Ontario separate school funding case suggested that other provisions of the Constitution could override charter rights. One is potentially by showing that another part of the Constitution constitutes a fundamental

part of Confederation compromise and the other would be to expressly permit certain distinctions via other parts of the Constitution.

Now it seems to me that you could interpret Meech Lake to use and enhance legislative powers by assisting in the definition of a given piece of legislation in a way which would permit it to be found to be *intra vires*. In other words, you could save legislation by using section 2, by saying that by use of its purpose it could constitute a fundamental part of Confederation compromise.

Second, you could also use an interpretative provision such as section 2 to assist in a determination of whether a specific power-granting provision of the Constitution does or does not expressly permit a given distinction. To simply say it is only an interpretative provision—it can be used to interpret the purposes of legislation and therefore to aid in a finding that it is in fact *intra vires*.

The other point that should be made is, as an interpretative provision you can say that section 2 would certainly have an impact on other interpretative provisions like section 28. So the fact that section 16 is limited to only certain interpretative provisions creates, if not a hierarchy of rights certainly a hierarchy of interpretative provisions. As my colleague suggests, in so far as those interpretative provisions then go to define the scope of rights, a hierarchy of interpretative provisions will in itself have an impact on the scope and definition of other charter rights.

**Mr. Offer:** Of course, from what we have heard with respect to section 28 it is not that clear type of interpretative provision. Section 28 deals with rights with respect to the final point you have made and, as such, is something different in nature, different in substance from section 25 and section 27 and section 2. These are interpretative clauses and they are read in conjunction with other things, but they do not convey rights as such.

As to the matter you bring forward with respect to your nonexclusive list, I think what you are dealing with is, or I sense it is, something of a rights nature. I am wondering if, from the submission you are making, that maybe section 2 is being changed from that which you have already indicated as being an interpretative section to a rights-giving section.

**Ms. Bayefsky:** To put it another way, to define a right, to define the powers in the Constitution Act by reference to the purposes set out in section 2 will help determine the scope of legislative powers. I do not agree with the

submission that it is only an interpretative provision in so far as your comments seem to suggest. I think it may—we do not know finally—but it may have wider ramifications. It certainly has those ramifications via section 1 and it is the interpretation of limitation clauses on rights.

I do not think it is clear at all that section 28 is a rights-granting provision. In fact, women of Canada heard just the opposite only five or six years ago. It strikes me one cannot have it both ways. Five years later, it is suddenly a rights-granting provision. It has not been so far interpreted that way in the courts. It seems to enhance section 15 vis-à-vis sexual equality, to perhaps strengthen the requirements for section 1 vis-à-vis section 15 sexual equality rights, but other than that I do not think it has further effect.

1600

**Mr. Maldoff:** If I may just add a comment, my professional deformation is to be a lawyer, but I hate the mysteries of law so I will try to deal with this in terms that I normally understand. I think this distinction between substantive provisions or rights and interpretative provisions is a distinction which is very interesting for all of us to discuss and really not one of very great importance.

If we were to forget about Meech Lake and just have one amendment to the Constitution, it is that henceforth the Charter of Rights shall be interpreted in case of doubt in favour of the government. I would venture to say that is highly substantive and we would not be sitting in our chairs right now, we would be standing on them.

When we look at the charter, it is open to a considerable amount of interpretation. We are seeing a lot of litigation that is keeping many of us in our profession very occupied full time and quite well off to boot. We are seeing litigation about, for example, is language protected by freedom of expression? Are films protected by freedom of expression or are films just the same as selling ashtrays and not really a form of expression?

We are seeing debates right down through virtually every one of these charter rights as to its extent, its scope, its meaning, how far it applies. We are all aware of the abortion debate right now. Where does life begin? All of these questions are substantive charter questions which are determined on the basis of interpretation. So when we come in with Meech Lake and start to say, "Now we are going to interpret the Constitution in light of certain new principles," that has a substantive effect.



That is the point we are bringing forward here. We think this has a substantive effect whether it is an interpretative section or not, and we would venture to say that the people who signed the Meech Lake accord were well aware of the fact that it had a substantive effect, because otherwise it would be very hard to explain why they put in subsection 2(4), which says nothing in section 2 derogates from the rights, powers and privileges of government. Clearly, some people sitting in that room, and more than one of them, were concerned that section 2 had a substantive effect on rights, powers and privileges.

We get our rights in a variety of ways. One of them is through interpretation and therefore this distinction really, to us, is not very salient at the end of the day. To answer your second question, do we seem to be adding a list of substantive rights by proposing a nonexclusive list to be added to subsection 2(1): what we are saying is if we are going to interpret the whole Constitution, including the charter, in light of certain things that we consider fundamental to this country, and we are going to direct the court when it reads subsection 2(1) that the court shall interpret this, the Constitution shall be interpreted in each and every case in light of subsection 2(1).

The question we would put is: is that the only thing that the court should consider? You would say, "Perhaps the court can consider other things, too." But if we are going to direct in our Constitution that the court must focus on certain things, and we are here before you today to say that we think it should also focus at the same time on our multicultural character, our commitment to fundamental freedoms, our commitment to equality, our commitment to aboriginal rights; let the court deal with all of those together as it goes through, just as it always has and should. But to suddenly recast the Constitution and say there is a hierarchy now—there are certain things that have to take priority; the others, well, you can deal with if you want—that is what disturbs us.

We say if we are going to interpret the Constitution of Canada, interpret it in light of the values that make Canada what Canada is.

**Mr. Sterling:** I would like to thank you for your presentation. I find some of the arguments intriguing and fresh and new.

One very small point that I would point out in your brief is that both of our territories were in front of us and you talk about picking judges from all the provinces, I assume you include the territories as well when you are talking about that. One of their principal beefs was that you could not be from the Northwest Territories and

be appointed to the Supreme Court of Canada. I am sure your amendment, in terms of having the provinces submit names from anywhere, would include the territories.

**Mr. Finkelstein:** That is correct.

**Mr. Sterling:** As I hear different briefs from different groups on this particular matter, having lived through the Bill 30 debate and having been the only member of the Legislature to oppose that bill, because I consider the charter the most important part of our Constitution, our laws and our system, I get concerned when our political leaders try to tinker with basic concepts by trying to divide out different groups and start to deal with different rights for different kinds of groups.

I am also concerned, in terms of this accord, that they are going to continue to have constitutional conferences. I think my concern in that area concerns the politics of the day, as I believe it was in Bill 30, because now in our province, politically, the Roman Catholic population is 41 per cent and this Legislature clearly discriminated in favour of that group voluntarily. It concerns me in terms of the continuing pressure by various groups and various interests who affect our political leaders and change the basic structure of our country. Do you have that same concern about the continuing desire of our political leaders to tinker with the Constitution?

**Mr. Finkelstein:** The Canadian Jewish Congress submissions are directed at what we believe to be the three most difficult and flawed parts of the Meech Lake accord. There certainly may be other problems, but if we can come away from this committee having persuaded you that there are at least problems in these three areas, basic fundamental problems, then we will consider that we have done our job. That is not responsive to your question about whether or not something else is a problem. It may well be. But the Canadian Jewish Congress's most basic concerns are with respect to the three areas which we have brought forward in our brief.

**Mr. Sterling:** I guess my concern was in 1982. I do not like section 33 in terms of what it does in terms of equality across this country. I see the Meech Lake accord as a further example of when the leaders get together and they make a decision, they also weaken the charter again.

**Mr. Finkelstein:** Sir, if Meech Lake is any indication of what is going to come out of constitutional conferences, then we would have to agree with you.

**Mr. Breaugh:** I am awed by the brain power that is with us this afternoon, so I will try to

exploit you because we will never get this kind of legal advice for free again.

**Mr. Finkelstein:** We all work cheap.

**Mr. Breagh:** This is free, is it not?

A number of us have gone at this vexing problem that you have identified as one of your three main concerns. I think you made the case that no matter what words we put here in this accord, where we place them and whether we consider them to be interpretative or not, when it goes to court people like you are going to say, "Notwithstanding all of what their intentions were, the words are there, this is how we view them and this is how we want to pursue our argument."

I would contend that something must be done that establishes the relationship between that Charter of Rights which people thought they had and this accord. You have suggested amendments. Normally, that would be the process that we would use. I want to point out to you that this is not, by any stretch of the imagination, a normal process. In reviewing the work of the joint committee federally, one of the things that becomes obvious is that the traditional parliamentary tool of moving an amendment did not work there and it is unlikely to work here.

**1610**

Moving the amendment is no trick. We have had the words supplied to us now by half a dozen different groups. Putting them on the table in this room is not a problem. Getting them out of this room is the big problem, the first hurdle. Then you have to get them through the big room upstairs, the Legislative Assembly. Then you have to get them through all the other chambers in Canada, and that is a monstrous task.

Given all the parliamentary devices that could be used to simply not put the amendments, not have that debate—some Premier would just say, "The game is off. The rules were we would not take amendments, so we do not want to hear what Ontario has to say." For all intents and purposes, the amendment process is a nonstarter for most of us.

We are left then with the choice of doing what will happen inevitably and that is putting it off to the court. Do you see that is being a viable alternative to amending the process?

**Mr. Finkelstein:** Are you speaking of a reference, sir?

**Mr. Breagh:** Yes.

**Mr. Finkelstein:** Our position is that anything that will render this more certain in the sense that the charter is unaffected by Meech Lake is a good

thing. If a reference will do that, then our position is that that should be done. It should clearly be done.

What we would do is we would point out the drawbacks of a reference, as you have pointed out the drawbacks of the amendment procedure. The drawbacks of a reference are at least twofold. The first is, you get the answer to the question that you ask and it is—

**Mr. Breagh:** With lawyers that is always a problem.

**Mr. Finkelstein:** It is a problem with everybody. I have been to a few question periods. It is very difficult to draft a question today that is going to cover all future situations. That is the first problem.

The second problem, and I alluded to this in my principal presentation, is that you cannot look at section 2 in a vacuum. You must look at it in connection with the judicial appointment process. If you have a court today say that the relationship between the accords and the charter is so-and-so, and you then have in the fullness of time provincially nominated judges, judges who might be appointed from a list of one, who are going to go with that in concrete cases, you might find the answer that you get in the reference distinguished away or emasculated in some other way. So those are the drawbacks to the reference procedure.

Having said that, let me reiterate that anything that would make it clear that the charter is unaffected is a good thing.

**Mr. Breagh:** OK. I want to deal quickly with the other two main points that you had, not that I want to give them short shrift or anything. I would put to you that I am less concerned about the appointment of judges to the Supreme Court than you appear to be. I think most Canadians probably would take the position that that has some potential in there for danger, and I think we should be mindful of that, but is it less dangerous than the current process, whatever magical process we have at work currently, where appointments are made all of a sudden?

The public does not quite know—the people in my riding do not know—how this happens. I do not know how this happens. Not that there is any partisanship involved, but it always seems to me that, by and large, a Liberal government seems to find the most eminently qualified Liberals from across Canada and appoints them, and a Tory government provides the most eminently qualified Tories. Now a shift from that kind of a process that is misunderstood and is wrong, as I



have put it, to something which is done out in the open, I do not see as a bad thing.

I appreciate that there is potential down the line for this thing to go wrong, but I do not share the same concern that you have about that matter, nor do I really about the immigration matter. I am ashamed to say—and we are admitting this too often regularly—not very many of us knew that the provinces had immigration agreements with the federal government. I, myself, just had a chance to read them today. I did not know such documents existed.

As I looked through them, by and large, all of the existing agreements between provinces and the federal government contain virtually the same thing. They go about it in a slightly different way and some into more detail. The one between Quebec and the federal government, for example, is the most detailed of them. But again, having read those documents, I do not find much to concern me there. An abuse of what is contained in the accord about immigration would concern me, but going from an existing process to what is suggested in the accord does not seem to me to be an alarming step.

Do you care to comment on either of those two points?

**Mr. Finkelstein:** I would like to comment on both. In so far as the Supreme Court of Canada appointments are concerned, without making a comment about whether current procedures are political or not political—everyone will draw his own conclusions—but as a student of constitutional law, I will say that I, in reviewing constitutional decisions from the Privy Council on forward, have not seen any evidence that the federally appointed courts have a federal bias. You will find very strong provincial decisions. That is the first thing I would say.

The second thing I would say is that my concern with the new process is that you might have a government in Quebec in the future which has a very different vision of Canada than we have now. That government could nominate a list of one which could deal the Canada that we know a very significant blow.

As to immigration, I think my concerns are simply that the federal power should be made more explicit.

**Mr. Breagh:** OK. Maybe I could give you one last shot. One of the things you did not mention in your presentation this afternoon—and it surprised me somewhat, frankly—is how we got here and where we go from here, the process question. I must say, as one who is appalled at how we got here, I am more than appalled at what

might happen in the next few years. To be as polite as we can, this is about the most undemocratic thing that could ever have happened. It is unacceptable that 11 people who are not specifically elected to do this—they are certainly elected, and so am I, but none of these people was elected to draft a new Canadian Constitution behind closed doors, and nobody talked about that prior to any election period.

I have some grave difficulties with how we got here but, not to cry over spilt milk, what I am worried about now is where we go from here. It surely is untenable that deals like this would be put together in secret, then made public, and then no one is allowed to change them. That is not democracy as I know it; that is democracy as it is practised in several other countries in the world, but not here.

I am concerned about what might happen in the foreseeable future. Lining up the first ministers' conferences does not bother me. That they would all meet and have fine wine, good food and discuss wonderful things about economics and about the Constitution does not bother me at all. But the concept that every year now we will change the Constitution in this country, that bothers me a whole bit because basically constitutions work well when they are clearly stated and you let them kind of simmer for a while. Those learned people on the bench make very learned decisions and nobody hassles them; they have all the time in the world, great minds, fine research and all of that. That is how a Constitution works. But it does not work when somebody pulls the rule book out every year and says, "We are changing rule 16." That concerns me somewhat.

I am concerned that the acceptance of the Meech Lake accord changes the rules substantively for a lot of people. It may be that women and other majority groups in our society may never have the same constitutional rights again in this nation if their interpretation of the Meech Lake accord is correct. It certainly is true that the territories are occupying a different time warp here than they did previously if this one goes through.

So the rules are changing substantively with this accord, and the future of the nation will change substantively unless we get a better process in place. I would be interested in your response to the process itself and any comments you might have about what we might do to save our souls.

These guys are all speechwriters for Mulroney.

1620

**Mr. Finkelstein:** Sorry. Did you ask whether I was a speechwriter for Mulroney?

**Mr. Breaugh:** No; that would be unparliamentary.

**Mr. Finkelstein:** As to the process, you have outlined the problems in the process, and I think to outline them is to recognize there are problems. I would simply agree with you that the process was not a good one, but it brought us here, and we are now dealing with a particular accord.

In our view, the accord that was generated by that process was a very bad accord, at least for the reasons we have put before this committee and possibly for others. As I said, there may well be additional problems with the Meech Lake accord, but certainly there are the three.

Where do we go from here? Before you get to the annual conferences, I think you have to deal with Meech Lake, and Meech Lake has significant problems. You have outlined the difficulty of amending Meech Lake. In our submission, Meech Lake must be amended. If it is not to be amended, we are better off not having a deal at all. I think we want to put that clearly on the table.

As to where we go from there, as I say, the position of the Canadian Jewish Congress is limited to these three areas at the moment. There may be problems with where we go from there, but I think the biggest problem is where we are now.

I believe Ms. Bayefsky has something to say.

**Ms. Bayefsky:** I would add that the Canadian Jewish Congress participated before the Hays-Joyal committee and appreciated the opportunity to do that before the constitutional amendments of 1982 were put into force. Section 33, of course, was added without public consultation of the same sort and, as a result, we are here today after the fact saying, "By the way, it would be nice if, in the future, section 33 were taken out." Obviously, that scenario is unsatisfactory.

Also, we can only assume that our comments and suggestions as to the appropriate amendments to Meech Lake will be taken seriously here and by the government and that this is not a case of simply wanting to put Meech Lake forward and talk about amendments after the fact. That is obviously, again, unsatisfactory.

**Mr. Maldoff:** If I might just make a comment or two on this, you remarked at the beginning that we are here in force today. We cannot overstate the importance we attach to what is going on with

Meech Lake. As Mr. Finkelstein stated at the outset, there are very fundamental issues at play when we deal with constitution-making and constitution-amending, and one of those basic issues is the balance between majority rule and respect for minorities.

One of our driving preoccupations as we look at Meech Lake is that we see that balance being tilted back to majorities, back to powers and away from rights. I do not think it is any coincidence. You have mentioned that women have complained and the territories have complained, but you have also heard the francophones of Ontario complaining, and you will hear the anglophones of Quebec complaining, and you have heard women complaining and the handicapped complaining. Virtually every group that perceives itself to be in a disadvantaged situation, generally speaking—not just under Meech Lake but generally speaking—is coming before committee after committee across this country saying, "This deal hurts us."

As we look at this, we say, first of all, we can look to the future. Sure, what do we do post-Meech Lake? But the problems you are presenting for the future do not have to be there if there is not a Meech Lake. Those annual meetings do not take place if there is no Meech Lake. I think it is very important that before we all take this as a fait accompli, we take a long, hard look at what we are really saying about the future of this country and the respect we have for our minorities, for multiculturalism and for so many values we have.

The second point I would like to make is that underlying our brief is a general principle that we do not think constitutions should be tampered with lightly. We agree fully that these matters are of the utmost seriousness and need a great deal of deliberation, time, thought and openness of process so that there is adequate input and we know where we are going with it.

Underlying our point here, for example, as the Meech Lake accord affects the charter, we are saying that on matters of that importance, the burden is on government, the burden is on the legislator, to prove that rights are not being affected. It is not up to the citizen to come to prove to legislators that our rights are definitely affected. We are in the disadvantaged situation, and the burden is on government to carry that ball and make adequate proof of the point.

The last point, and it is somewhat of a concern to us, is with respect to the Supreme Court. We do not see that as something that potentially can be a problem. The Supreme Court is part of the



balance between majorities and minorities. We have a charter. We could just say, "Let us have a charter and let the legislators, who are elected by majorities, interpret the charter." Instead we have said, "No, we are withdrawing that from the legislator and we are going to have a different body." It is not perfect. Judges do not get there by the most perfect mechanisms, but at least it is somebody else passing on this and we have a balance that is established.

Now we come back with Meech Lake. Not only do we tamper with the charter by adding an interpretative section, we tamper with the courts themselves; we tamper with how those judges are going to get there. Not only that but, to the extent that any province complained about the unilateral power of the federal government to appoint Supreme Court judges in the past, what we have done now is to grant the unilateral power of the province of Quebec to nominate its judges. And it is a unilateral power. Nobody else can put forward a nominee for three positions on that court.

So on matters that are fundamental to the future of this country, every time we have a constitutional debate, you are going to have three judges that were put there by the provincial government of Quebec. What if the federal government says no? Well, I do not know how many of you partook of the great orgy of satisfaction that we finally rid ourselves of Pierre Elliott Trudeau and the era of confrontation. It would take someone like that to stand up to the province of Quebec, for example, in a nomination fight. Is that where we want to go?

That is why we are concerned about the deadlock issue. We see that as an immediate problem and a real problem. Let us not forget: two of the three judges on the Supreme Court from Quebec were appointed while the Parti québécois was the government of the province of Quebec. If Meech Lake had been in place, where would they have come from? So it is an immediate problem and it is a real problem, and it affects how that Constitution is going to be interpreted and how people sitting on that court see their roles in that court.

It is not only a Quebec problem. As we look at free trade, everybody has always said: "Well, the interests of Ontario are consistent with the interests of Canada. Ontario is Canada." We hear that coming out of western Canada, Quebec and some of the other parts. Suddenly we see the interests of Ontario on free trade are not necessarily consistent with what the federal government wants, and there is a debate going

on. How would the federal government be able to enforce free trade in Canada? The argument comes back: maybe new life has to be breathed into subsection 91(2), the trade and commerce power. How would that life get breathed there? Through the courts. Would Ontario be very interested in appointing a pro-expanded trade and commerce power judge to the Supreme Court if it were in a conflict over free trade?

**1630**

So it is not just a Quebec question and it is not just an Ontario question. Surely if Mr. Vander Zalm were asked to put forward a name in the current context, he would ask a question or two of a judge's view of abortion these days. The question then comes down to, and this is immediate: what do we want for the country?

**Mr. Chairman:** I want to follow up on something not directly on the question of the judges. I would have to say that, perhaps at another time, I do not agree with everything you are saying and I do not necessarily agree that a province is going to be any less or any worse. I appreciate the particular Quebec examples, but I still, over a period of time, would question whether it would necessarily be that way. But I accept the argument you are putting forward.

I would like to go back, if I might, to a problem that I think we have as a committee, and I guess I want to go back to the beginning of the accord. One of the things I found really interesting as we have talked about the accord is that we are told that at the time of the Quebec referendum, if you like, a pledge was made whereby if Quebec voted no in the referendum, there would be changes brought about with respect to the Constitution and Quebec would be made a full partner in confederation. The arrangement of 1982, for a variety of reasons, did not do that, and while legally Quebec was in, there was something missing because they had not signed the agreement. So we have then the election of a new government in Quebec. A variety of principles come forward on which the 11 governments began to have some discussions, and ultimately we are told this then led to the Meech Lake accord.

Let us suppose for a moment that the first ministers had not signed it but had said: "Look, we think this is good, we think this is important. We are going to take it back to our various legislatures and have these sorts of discussions." It seems to me that one of the issues that at some point those of us here have to grapple with is that, in terms of the various concerns and issues that you and others and that we ourselves have in our

own minds about this, we are also measuring that off against another reality, which is that in Quebec there is a sense that what that accord does is to bring them back into the family. Now, whether it does or it does not, we are talking in many instances here of how people perceive things.

So it is not as though we are looking at this accord and sort of saying, "Look, it is very interesting, but we do not like A, B, D, F and G; go away and do something else;" because clearly, if we were to reject this accord there are implications in terms of what that means within Quebec. What would their reaction then be in terms of perceptions of what our rejection meant? We might say, "Look, we accept the 'distinct society,' but we have grave concerns about charter rights and how they are dealt with and we have some concerns about a variety of other things."

So as we struggle with where to go in terms of this, that is not to say that just because we do not know what Quebec might do we should therefore reject your comments, because then we would be in a never-ending situation, a catch 22. Yet it seems to me that as we discuss these points and issues, that is still one of the things that somewhere down the road we have to deal with; so that if we are saying, "Look, there are things we do not like, or we want to make suggestions," whether as amendments or in other terms, we have got to find a way to keep the process going. We cannot simply, I do not think, slam the door and say: "We do not like it. That is the end of it."

In terms of that, I then see, in a number of the proposals that different groups have made to us, that there are various areas where I think one can say, "Look, you might be able to handle that in this way, because it does not necessarily go, say, to the root of the accord;" which it strikes me is that "distinct society" clause.

Mr. Malloff quite correctly noted that l'Association canadienne-française de l'Ontario, the Franco-Ontarian organization, went directly to that point and, for them, saw the "distinct society" clause as a fundamental wrong, as something that was going to limit them as Canadians. I do not want to prejudge what Alliance Québec will say, but perhaps tomorrow as we listen to them there may be some of those things.

We are wrestling, then, with the following: if we accept that a lot of the things you are saying here are correct, or if we would like to move in that direction, we also, I think, no matter what we do, have an obligation to ensure that Quebec

is not locked out again. If you want to talk about minorities, I suppose within the Canadian constitutional framework Quebec is the original minority, or at least the Franco-Québécois would see himself or herself as the original minority. I am having a very hard time, regardless of what any particular Premier or Prime Minister has said about the accord, because I am concerned about what I do as an individual legislator to this accord and its impact on Quebec, and trying to find a way that will respect concerns that you and others have raised but keep us moving forward. I think of that original goal, of what the 11 first ministers were trying to do—and I think we have to give them that; I do not think we can just say they were a bunch of silly people locked up in a room. They were, after all, elected.

Interjection.

**Mr. Chairman:** Yes, right; but that is an aspect of all of this: where do we put Quebec? What is the message that we are sending back to Quebec? How do we move forward? Now, I do not have the answer to that today and I am not saying that you do, either, but I would like to share that dilemma with you, and any sort of thoughts or concerns you have would be very helpful.

**Mr. Finkelstein:** Mr. Malloff, as an English Quebecker, will carry the brunt of that answer, but let me just say this. There are very fundamental flaws with the Meech Lake accord. In our view, and for the reasons that we have given orally and for the reasons that we have given in our submission, it will have a very significant impact upon minority rights, a very significant impact upon the Charter of Rights. If that is the price to pay for asking Quebec to sign the Constitution, then it is too high a price to pay.

As to locking Quebec out, nobody is locking Quebec out if this accord does not go through. The reality is that it is difficult to make constitutional agreements, but that is the nature of constitutionalism. But this agreement is too high a price, and if you are balancing something, then you must give due weight to that balance. Give consideration to the fact that it would be very difficult to amend the accord, but it does not begin and end with the difficulty of amendment. If the price is too high, it should not be paid.

Eric is an English Quebecker, and I know that he certainly has thoughts on that.

**Mr. Malloff:** I will be very brief and just add that the problem you are grappling with is a real problem. As someone who lives in Quebec—and I am a Quebecker who happens to speak English, who happens to be a Canadian and who happens



to believe that I am equal in my province because of that—I am very well aware of the emotions and the sentiments that are running in Quebec. They are to be considered, there is no doubt of that.

But I would think that in terms of your point about how do you as an individual legislator come down to dealing with this, I can only answer by saying that if I were an individual legislator and if I were legislating not with respect to automobile insurance, which we will do tomorrow and we will do again next year and if we do not like it then, we will do it in two years, but something that is of profound impact—and let us remember that part of what we are doing here is affecting the amending formula such that, if by chance we are right, and I think we are, you are going to have a very hard time ever fixing that problem, because if in fact governments obtained more powers out of Meech Lake, and I will leave Mr. Finkelstein speak to this in more detail, I think the amending formula in the future would make it virtually impossible for you to rectify that problem.

#### 1640

That being the case, I would be looking at this in a very broad perspective of what I see for the future, not only as a member of the Legislature of my particular province, but as somebody who cares about the future of this country and where it is going. Your answer to that would be, "But I am concerned about what happens if Quebec gets really annoyed." I suggest that probably one bottom line I would sleep very well with at night is coming down on and putting to Quebec, very simply, leaving all the other details aside, is the price of Quebec's entry into the Constitution the diminution of the rights of any citizen of this country? Is that your price? Because that is the question that has been fudged publicly.

I would feel quite comfortable putting that question. If the answer to that question is yes, then let us have a raging debate in Canada about that and then we will know what we are buying into for the future. Right now we are being invited to buy a lot of—you are speculating; I am speculating; we are all conjecturing. It is, "Let us take a leap of faith" type of argument; "and if we do not, Canada is doomed anyhow."

Our position is that Canada is not going to be in very great shape if this goes through in any event. Let us get the issues on the table and go to Mr. Bourassa or whomever in Quebec and say: "We have one question of principle. It requires a yes or no answer. Is the diminution of rights the price?" If he says no, then it will be the easiest thing in the world to make that clear in this

document. Granted, there will be 400 lawyers who will help you with it, but really it is not that difficult to pass.

**Mr. Cordiano:** That is part of the problem.

**Mr. Maldoff:** No, it is not as grave a problem as all that in the sense that if 11 men could get together in the room and sign it, 11 men could get together and work it out. As lawyers, we have been involved in enough of these that eventually, if the principles are clear, people will be able to find a way to articulate, even if all they say is, "Nothing herein affects the rights of any Canadian under the charter." It is a fairly clear statement.

**Mr. Chairman:** I will turn to Mr. Cordiano. I just want to thank you for sharing those thoughts with me personally. I appreciate that and the way you phrased the question is an interesting and compelling one. Mr. Cordiano has a supplementary. Then I have Mr. Allen and Miss Roberts.

**Mr. Cordiano:** I just want to say that you have put your finger right on it. That is what we are trying to grapple with here. It is the essence of the entire accord and what we are trying to deal with. Does it derogate from the charter? Is there a diminution of rights of individuals? We have been talking about this for the last three or four weeks in very finite detail. I think that is what we are trying to answer.

But you have your view, Professor Hogg has his and there are a whole host of other legal experts who have come before us. I imagine we are going to have endless numbers of others who will come before us and some who would like to come before us and have not been given the opportunity. We are going to try an accommodate everyone, of course. We are going through this with precisely that in mind. That is the essence of the decision we have to make.

**Mr. Finkelstein:** Our position is that the charter is clearly affected. Mr. Maldoff will take a little time and go through it in seven very concise points. If, when he is finished, you think there is a question about it, then there is a risk in proceeding.

**Mr. Maldoff:** This is the question that has seized the joint committee in Ottawa, the Senate in Ottawa—it has been raised over and over.

**Mr. Cordiano:** Sure.

**Mr. Maldoff:** In our view, there is very little doubt that rights are affected for the following reasons:

Section 2, the duality/distinctiveness section of Meech Lake, says that the whole Constitution is to be interpreted in the light of that, including

the charter, so the charter is now to be interpreted in the light of Meech Lake.

This is the second point: section 16 makes a clear exemption for multiculturalism and aboriginal rights. By making such a clear exemption, the first question is, why was it necessary? Somebody who was drafting this thought it was a reasonable concern that charter rights were affected, but was only prepared to immunize two of them. By not immunizing the rest, they have left the clear legal inference, and it is a well established legal rule with interpretation, that the other rights under the charter may be affected, always in the context where Meech Lake is saying the whole Constitution and the charter is to be interpreted in the light of it.

Then we go to subsection 2(4) which stipulates that, "Nothing in this section"—the duality/distinctiveness section—"derogates"—note the word "derogates"—"from the powers, rights or privileges of Parliament or the government of Canada, or of the legislatures...of the provinces."

Now if we look at section 16, it says that "nothing...affects"; the operative word is "affects." But in subsection 2(4) we have "derogates." Lawyers use different words to indicate different meanings. "Affects" means nothing can happen up or down, in any direction, sideways; nothing happens. "Derogates" means nothing detracts. Why did they not say "affects"? That "Nothing affects the powers, rights or privileges of government." No, they did not. They said, "Nothing...derogates." Inference? Possibility of an increase.

The first question is, why did they put subsection 2(4) in? Because the legislators and the governments were concerned that subsection 2(4) might affect their rights or powers, so they made it clear that no, that could not possibly be the case. Then they used the word "derogates." If we see the word "derogates," which leaves open the possibility of an increase of power, privilege or prerogative to government, then the question would have to be, where could government have got more power from?

Since no government under subsection 2(4) could suffer a loss of any power, because there can be no derogation of any provincial or federal power, where could the increase come from? I would say that power is finite. There is only so much of it. It is either shared or somebody has all of it. So to the extent that any government could get an increase of power, and it could not have been at the expense of another government, it must come either from the judiciary, the courts

that have a certain constitutional power to interpret, or the citizens who have certain rights protected and immunized under the charter.

Then we look at section 16 which tells us, "Yes, rights could be affected," because section 16 only says that multiculturalism and aboriginal rights under the charter are not affected, leaving open the possibility that everybody else's rights and all other rights could have been affected.

Furthermore, we look at subsection 2(2) and subsection 2(3), which now talk about the roles of government being "affirmed." I would also bring to your attention that subsection 2(3) in French is not an affirmation section; it is a conferral of power section. Leaving that textual issue aside, we have subsections 2(2) and 2(3) which now "affirm"—let us accept that word—roles of government.

Where the role of government steps in, the role of the courts may step out. Maybe it is now more the role of government to determine what is appropriate to preserve and protect duality and distinctiveness, as opposed to the role of the courts, so if you are looking for where this increase of power could come from for a government, the courts and legislatures are obvious candidates, and section 16, subsection 2(2) and subsection 2(3) are consistent with that.

Then we also see in subsection 95B(3), that when the people who signed Meech Lake, the first ministers, wanted to protect the charter, they were absolutely unequivocal and clear about it.

Finally, we see the joint committee report of the Senate and the House of Commons on Meech Lake, the majority report, which in response to the concerns of English-speaking Quebecers, said that it is unlikely any constitutionally entrenched rights of English-speaking Quebecers will be significantly eroded by the Meech Lake accord. We have the full quote in our brief. "The 'distinct society' clause is unlikely to erode in any significant way the existing entrenched constitutional rights of the English-speaking minority within Quebec."

## 1650

Now that is a majority report, supposedly defending this accord, and the best they can say about rights of a minority is "unlikely," which means there is a possibility that there is an erosion, and then they start discussing "significant." There may be an erosion but we will debate whether it was a significant erosion.

On those seven points, I suggest to you that all the evidence and all the weight of legal argument is that rights have been affected. Having discharged that burden, I would say that I would



like to hear the counter-argument that shows in a cohesive way how one answers that definitively. Even if there is some answer, and I am sure there will be a number of jurists who would get up—I note that even Professor Hogg will acknowledge that the interpretation, the way section 1 of the charter will be interpreted, has been affected by the Meech Lake accord; even Professor Hogg.

I suggest to you that the burden is now clearly on those who would like to adopt this, the legislators, the governments, those who gave us, the citizens, the rights and privileges of a Charter of Rights, to prove to us unequivocally that no rights have been diminished or adversely affected. It is not up to us to prove the contrary. We have discharged that burden. The charter should not be tampered with unless the legislators can satisfy us that there is a compelling national emergency that would justify it—even there we will have a debate—or that in no way was it affected.

**Ms. Bayefsky:** Can I perhaps add to that? Just with respect to section 1, I think there is a distinction to be made about the impact vis-à-vis the charter and section 1. That is, as we have mentioned already, that section 2 can affect the interpretation of section 1 in so far as it sets forth a number of purposes for legislation which may be deemed to be of “sufficient importance,” in the court’s words in the Oakes case, so as to satisfy the burden of the requirements of section 1. Therefore, in that manner, section 2 can affect the limitation of rights as defined under section 1.

But second, perhaps more broadly speaking, there is a more important effect on charter rights via section 1, and that is that in general, as the congress has maintained, Meech Lake represents a shift from courts, and their responsibilities to affect rights, to legislatures. It says the role of legislatures or government is “affirmed” and it suggests that the courts in some respects are going to have to, or should, defer to the views of governments as to what is necessary to promote the distinct identity of Quebec or to preserve the fundamental characteristics of Canada.

There is always a danger with constitutional bills of rights, as is evident under the European Convention on Human Rights where the European Court of Human Rights has simply developed a concept of margin appreciation which defers to the rights of governments to interpret what is necessary to protect rights. That is a danger in Canada, a danger with our Supreme Court vis-à-vis the charter, that they will not take a serious look, a hard look, and apply a difficult burden of proof on governments to show that a

given limitation is necessary, that they will defer to a government’s view as to what is necessary to promote, as I have said, distinct identity, or the other section 2 purposes. That shift in onus, between governments and courts is one which I think suggests a danger, in general, to the protection of rights under the charter.

**Mr. Cordiano:** I would like to pursue this but I am on a supplementary. Mr. Chairman, I will defer to you. There are a couple of other questions I would like to ask further to this. I will just wait my turn.

**Mr. Chairman:** Mr. Allen, Miss Roberts and then, if we are still *compos mentis*, we will come back.

**Mr. Breagh:** Hey, you cannot introduce that kind of creature here.

**Mr. Allen:** Compared to where we are at at the moment, everything else was preliminary. I mean, we really are at the nub of the question, I think, and it is quite clear that we are not going to have time this afternoon to really get into a full back-and-forth—on your seven points, for example.

In my own mind, I am not fundamentally concerned that the line between legislatures and courts might wander a little. It has been changing a lot in recent years. It will probably be some time before we find the right balance in those things. I do not think legislatures are simply a lost cause in the preservation of rights, nor do I think courts are the total gift of God to mankind to set everything straight. There is fallibility all around and there are problems on each side. That question, and some of the issues you took us through, do not necessarily cut as deeply with me as they perhaps might.

As I have listened to you, I have been trying to conclude where you are coming out with respect to “distinct society” language in itself. We have been through a long period of time trying to arrive at language that describes reasonably well for us, both in terms of our common parlance and in terms of our legal language and our constitutional constructions, just how we express for ourselves what the place of Quebec is in Confederation, and what status the majority of that population has in terms of some rather fundamental rights as a culture to maintain itself as a minority culture within Canada, within the North American continent.

In some ways the “distinct society” language was rather more helpful than some other languages we have had. “Special status” seemed to be transferring too much imbalance of power in one

direction for one province over against others, and yet it could be said that "distinct society" catches up some of those overtones and is more than an interpretative phrase and certainly does convey a power to do something that was not there before. I think I would be prepared to acknowledge that.

I am not sure whether that is illegitimate. I would certainly be more nervous about that than I am if it were not for the fact that there is a charter and there are courts. There can be bad law and there can also be bad legal judgements, but over time one attempts to make good law prevail and hopes for good judgements to replace worse in the courts.

If I look at recent history in Quebec, both in terms of legislation and courts, and think that is all a part of the "distinct society" notion, I perhaps get a slightly mixed story but I do find, for example, that the government could not prevail against the Protestant School Board of Greater Montreal when it came to defending its rights as a minority public-education institution over against the larger structure of public education in Quebec. The Charter of Human Rights and Freedoms in Quebec is a fairly extensive and explicit document, and while it does not have constitutional status, it certainly is something the courts have to wrestle with when they approach issues affecting fundamental rights.

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I have some trouble being hugely concerned myself about the language of "distinct society," and having it built in here and having a legislature that has the power to promote that, given that setting. You started off by counterpoising a number of things which maintain the kinds of balances that are necessary in our society. Among the counterpoises that have existed in our Constitution—unlike the American, I guess—is the fact that we have had collective rights defined.

We have had lawyers and constitutionalists talk about a little bill of rights that pertains to French and English language, to native peoples. We have undefined collective rights that have accumulated in our history, such as have attached historically to Mennonites and pacifist groups who were given exemptions in certain things that other people were not. Latterly, some people were able to annex them on a conscience basis, but it was not entirely satisfactory in its expression.

But all that taken together, as I reflect in my mind as I hear you talk, I wonder whether you are

fundamentally concerned about that collective right that appears to be being addressed in this instance, more explicitly—the "distinct society" language itself. Can you respond to that?

**Mr. Finkelstein:** Yes. You started off by saying there is a shifting line between legislatures and courts, and there is. The courts interpret section 1 or the charter itself and, in certain circumstances, they say, "This is not a matter in which we will intervene," or "This is a matter in which we will intervene." But the critical feature is that Parliament and the legislatures made a conscious decision that there was a problem. In 1982, they reacted to that problem by coming up with another accord which promulgated the Charter of Rights and Freedoms, the purpose of which was to transfer minority rights to the courts.

Where the line is depends on the case, but there is no question in principle that the decision that courts should be the arbiter of these constitutional rights is the rule. That value judgement has been made. But balanced into that was a recognition of collective rights, and that is what section 1 is all about. Infringements of charter rights are valid if they are reasonable or demonstrably justified. If the courts do not think they are reasonable or demonstrably justified, the legislature can override the decision of the court pursuant to section 33. So there is a lot of thought given in the charter itself to collective rights. What we say is, "Don't water that down still further."

You ask, "What about the 'distinct society' clause?" We, as the Canadian Jewish Congress, have to be very clear that our submission is that minority rights have to be protected. We do not have a problem in principle with a statement that says one of the fundamental characteristics of Canada is that Quebec is a "distinct society" clause, provided—and I say that very quickly and I underline it—it is also very clear that there are a number of other fundamental characteristics of Canada.

The courts, when they interpret the charter, do not only interpret it in the light of government obligations to preserve and promote Quebec distinctiveness and therefore defer the legislative judgements about that, but also recognize that fundamental to Canada, in the words of clause 2(1)(a), fundamental characteristics of Canada are minority rights, fundamental freedoms, equality rights, multiculturalism rights, aboriginal rights.

Those are equally fundamental, and unless they are specified to be equally fundamental to



the "distinct society" clause, there is a very grave danger that the Charter of Rights will be watered down. That is our concern. It is not with "distinct society" sitting there in a vacuum; it is what it means the way it sits there now.

**Mr. Allen:** What do you mean by watered down? I agree that one could have stronger statements about the multicultural phenomenon in Canada in the Constitution, for example, but when you say "watered down," watered down from what? The section 27 statement, for example, is about as preliminary a statement as you can make about multicultural rights in the context of the Canadian Constitution, is it not?

**Mr. Finkelstein:** What I mean is that the rights we have now are the rights in the charter. The only limits on those rights are in sections 1 and 33. What this does is to direct the courts, for the reasons that Mr. Maldoff outlined, to apply section 1 very differentially. In that sense, the rights are restricted in their enforcement.

You asked about multiculturalism. Why only multiculturalism? Why not fundamental freedoms, freedom of religion, equality rights? How far is multiculturalism protected? Section 27 is preserved, but what if multiculturalism depends upon freedom of expression and what if it depends upon equality rights? Those are not in section 16. How come?

**Mr. Cordiano:** That really has not been defined.

**Mr. Finkelstein:** No, it has not been defined.

**Mr. Allen:** I think I will be quite ready to concede that, by all appearances, section 16 simply came in as a political afterthought to meet a couple of lobbies that were out there that were causing the most trouble to a few of the premiers. It was, I think, a rather ignoble and disgraceful use of the constitutional exercise to do that, and it would probably all be much better without that.

I am not going to prolong this. It is the kind of discussion we need to have at length and over some time. I would be only too happy to continue at another time and another place with you gentlemen or perhaps back here on another occasion.

**Mr. Maldoff:** In terms of the afterthought, I have an afterthought on your afterthought.

**Mr. Allen:** I did not have an afterthought; they had an afterthought.

**Mr. Maldoff:** As to their afterthought, I do not think subsection 2(4) was an afterthought. Subsection 2(4) is a similar type of protection and immunization of government from the effects of Meech Lake. They may have had an afterthought

because some citizens screamed loud enough and had enough clout and were favourably enough perceived to get themselves into the play, but there is no doubt that the people sitting around that table thought that section 2 had effect and could adversely affect their powers and their prerogatives.

The second point—

**Mr. Allen:** I must say I am very puzzled as to what could potentially have derogated. I can see your inferential argument about the possibility of addition, but what would have derogated from the powers of the Legislature of British Columbia from any of the foregoing elements of the section?

**Mr. Maldoff:** What would have derogated probably is if duality is defined as French Quebec with some English and the rest of Canada as English with some French and then you have the role of federal government in all provinces to preserve duality, could that mean that the feds could come into Quebec and start telling them how to take care of the minority in order to preserve duality within Quebec?

**Mr. Allen:** The feds could?

**Mr. Maldoff:** Yes. Could the feds come in? The worry was did somebody suddenly get more power and did somebody lose more power. By saying no one lost power then, at minimum, Quebec is able to say, "You do not have any more power than you had before." It may not be entirely clear how much power they had before, but certainly Quebec is going to argue that it did not lose any power. It is that type of a balance to be worked out, and you can work out the pros and cons for all the provinces and the federal government in reverse also.

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**Mr. Allen:** So a protection, in other words, with regard to subsection 2(2), where Parliament and the provinces are named together with regard to preserving fundamental characteristics, and there could be some excuse for—

**Mr. Maldoff:** There could be. That is right. Or the other way around probably is that Quebec could be taking measures to preserve its distinctiveness, which might interfere and then the federal government might feel that in some way it was constrained.

The other point I would just like to mention is yes, it has been comforting to win or to see that the courts have upheld a number of provisions of the Canadian Charter of Rights and the Constitution in Quebec. You mentioned the PSPGM case. I guess that is the Canada-clause case. But

let us just remember that all those judgements were made prior to Meech Lake, prior to a direction from the Constitution of Canada that henceforth every provision in the Constitution will be interpreted in the light of a new series of considerations.

Maybe the Canada clause, the minority-language education clause in section 23 just may not have as extensive a meaning in the future as it may have had in the past. Right now, there is a big debate: Does section 23 include control and management, the right to control and manage minority-language education? The argument has been based on the equality provisions. Based on two official languages, it should. The courts have been going in that direction. There was a Saskatchewan judgement last week that tended in that direction, following a similar Ontario decision a couple of years ago.

Would that happen in the future or would provinces be able to come forward and say, "Look, we have to interpret this in the light of the fact that you are a minority and minorities do not have control"? I do not know the answer to that question but I sure would like to know the answer to that question before we all sign on the dotted line and cannot amend it.

**Ms. Bayesky:** In so far as you have asked how multiculturalism is really protected by just section 16, the Canadian Jewish Congress would agree that multiculturalism is multidimensional in the sense that it is true that section 27 is a fairly weak statement of the protection of multiculturalism. But that would just indicate, it seems to me, that section 2 should be strengthened even further to reflect protection for fundamental freedoms, the right that made multiculturalism thrive. Without that, it is true, section 16 is not going to do much of a job of protecting multiculturalism.

**Mr. Allen:** One of the great problems I guess we have is that we did an incomplete job in 1982 and, ever since, we have been sort of stepping our way through single exercises. Every time you move in a Constitution you beg a question about every other part of the Constitution. So the whole process is a series of incomplete exercises, all of which raises the full question of whether we should either sit down and do it all once and for all and leave it for 50 years, or forget about the whole thing.

**Mr. Chairman:** Mindful of the time, Miss Roberts has a particular—

**Miss Roberts:** I will be very brief because everyone has said just about anything that needs to be said today with respect—

**Mr. Chairman:** Just before you ask your question, could I ask at the conclusion if the members of the committee would stay for 32 seconds to deal with three very fast administrative matters. Thank you.

**Miss Roberts:** Thank you very much for your presentation. It has been very helpful and it has given us a more detailed way of proceeding with looking at the charter and at the accord from a legal point of view. It has been very helpful to me because it puts together at least some ideas of how to trace through the various sections of the accord and how it may affect the charter.

I have listened very carefully to what has been said and my concern is with respect to the process, comment being that if the process is so flawed that we cannot accept the accord itself, that is the important thing we have to decide. Is it so flawed that when they did not allow open meetings, when there were not the necessary steps taken to come to the accord, that we should just throw the accord out?

What you have said today I believe is that the Meech Lake accord is fundamentally flawed and what you are suggesting is a change in the accord such that it would not be the Meech Lake accord. You cannot amend it the way you are stating. You are fundamentally changing the basis of the accord. The basis of the accord would appear to accept the duality, the distinct society, between Quebec and the rest of Canada.

You are suggesting that what you put in, multiculturalism, freedom of such, such and such, is going to basically change the accord so that it no longer deals with that one particular point but indeed will develop a new approach to the development of our country on a multicultural basis and may be a better statement of what our country should be. I am not saying it is right or wrong, but what you are saying to me today is that you cannot amend the accord; it has to be changed.

**Mr. Finkelstein:** In a way, in a very real way, that depends upon whom you listen to.

**Miss Roberts:** I am listening to you today.

**Mr. Finkelstein:** OK. What we have been told and what the joint committee said is that Meech Lake is really not going to change minority rights very much anyway. That is what Professor Hogg said, as I understand it. That is what others have said to you, as I understand it.

If that is true, then it is really not a very fundamental change to make that explicit. It is only if that is not true that what we have proposed today is very fundamental. If what we propose today is a fundamental change, that minorities be



protected, then it is something that we submit to you should be given very serious consideration. On the other hand, if what the proponents of this accord say is true, then it is not a fundamental change and there really should not be a problem in amending.

**Miss Roberts:** One way of dealing with this to determine whether it is a fundamental change would be if we knew what had gone on in the closed meetings, what the intention was, what the discussions were. That would have been helpful in our deliberations, would it not?

**Mr. Finkelstein:** It would certainly have been helpful. I agree with you 100 per cent. I would also say that what we have now is this. Even if we had been privy to what was going on in the deliberations, how much weight a court would give to that as opposed to what actually appears on the paper is another question.

**Miss Roberts:** One thing is with respect to the judges. I hate to agree with some of your points—

**Mr. Finkelstein:** Force yourself.

**Miss Roberts:** —immediately, without spending hours and hours thinking about them. Your concern is that you still want a national basis for the appointment of judges, even though the provinces are the ones that make the recommendation. It should be on a national basis.

**Mr. Finkelstein:** That is correct. It is a national institution and as with the six non-Quebec seats where all the provinces can nominate judges, or at least the other nine can,

we say that should be the case for all nine seats. What is good for the six should be good for the nine.

**Mr. Chairman:** Lady and gentlemen, thank you very much. You have been very good. We have gone on at great length about some very fundamental issues. I know I speak for everyone on the committee in saying that this has been tremendously useful for us. I think the perspective, the feeling with which you hold those views comes through very clearly and the arguments are very clear.

I suppose each day we are hoping this is going to get simpler. I do not know if it is getting any simpler but I think there is no question that you have in a sense posed questions to us which are going to help in sharpening our focus on the accord. We are very grateful and thank you again for being with us this afternoon.

**Mr. Zaionz:** Mr. Chairman, on behalf of our committee, on behalf of the Canadian Jewish Congress, I would like to thank you and the members of the committee for receiving us. If you would like us to act as your research committee, I am sure we can undertake it—

**Mr. Chairman:** If the price is right.

**Mr. Zaionz:** —and continue the discussion at another time. Thank you very much.

**Mr. Chairman:** Thank you. We will reconvene in the morning.

The committee adjourned at 5:20 p.m.

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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Wednesday, February 24, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, February 24, 1988

The committee met at 10:06 in room 151.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. We are ready for the next session. I would like to ask the representatives of Alliance Québec to please come forward: Royal Orr, president, and Russell Williams, executive director. Please take a chair. We welcome you to the committee's hearings. We appreciate your taking the time to come and present your views.

Our 11 o'clock witness had to withdraw today and so we have a little more time than we perhaps thought, which might turn out, in any event, to be quite useful. You have a presentation to make and you have passed out a document to us. Please go ahead in making your opening remarks and we will follow up with questions.

### ALLIANCE QUÉBEC

**Mr. Orr:** Mr. Chairman, I would like to thank you and the members of the committee for giving us the opportunity to speak before the select committee on constitutional reform. We are pleased to appear before a committee of the Ontario government to discuss what we see as serious and unacceptable shortcomings of the Meech Lake accord. We would like to commend the government of Ontario for holding open hearings on the 1987 constitutional accord, hearings based on the final text of the accord and hearings in the full light of public attention after due time for reflection on the text.

It is with regret and anger that we must say that the governments that are directly representative of our community, that is, the governments in Ottawa and in Quebec City, have abandoned their responsibility to the needs and interests of our community. It is not overly dramatic to suggest that this may be the last public occasion we English-speaking Quebecers will have to discuss with Canadian legislators why Meech Lake must be changed.

It is not, I believe, wrong for me to hope that here in Toronto, for the first time since the accord was struck, we will be heard openly and reflectively by politicians without the prearranged and partisan conclusions of the debates in Quebec City and Ottawa.

The fact that you have asked Alliance Québec to your hearings shows clearly that you do not share the view that is rather widely held in Canada today that provincial governments should look only to their own backyards. Your invitation to us shows you understand that the building and amending of the Constitution is more than political deal-making. The Constitution of Canada is not simply a bit of legal paperwork to allow for the smooth running of government in this country. Our Constitution is also the document that defines us as a nation, a document that states what is of most importance to us as Canadians, a document that enshrines a vision of what we are and what we should become.

Today, we would like to discuss with you the vision that lies at the heart of the Meech Lake accord. We will suggest why that vision is inadequate and potentially destructive of the interests of our community and of official language minorities in other provinces, and ultimately destructive of a nobler vision of Canada that inspired us before Meech Lake.

Alliance Québec represents the English-speaking community of our province. English-speaking Quebec has a long and proud history as an integral and contributing part of Quebec. Since the beginning of the constitutional history of Canada, our community has been recognized as a legitimate and important element of this country with full rights to participate in the life of Quebec and Canada in our own language. Where the state met the individual, in the Legislature and in the courts, our rights to be heard and served in English were made explicit, as were the rights of French-speaking Quebecers. Section 133 of the British North America Act enshrined the principle of equal footing for what would become Canada's two official languages.

Over the years, our community grew and flourished in the soil of constitutional and political recognition and acceptance. We built schools and hospitals, developed voluntary agencies and public institutions. In recent years our community and its institutions have fared less well, but we still number 800,000 people, more Canadians than at least six of Canada's provinces.



Our community's vision of Canada is clear. It is a vision which we as Alliance Québec have supported across the country. We believe in a bilingual Canada, a Canada where the English and French languages are equal throughout the country and where all governments work to promote the right of Canadians to live and participate in their official language of choice.

We believe that all Canadians should expect a full complement of basic services in their official language, in education, health and social services and government services, as well as access to justice in either French or English. We commend the government of Ontario for taking bold steps to provide these sorts of rights and services for its French-speaking minority. The vision of a bilingual Canada seems to lie at the heart of these actions by the government of your province, but we do not believe this vision lies at the heart of the Meech Lake accord.

There are, it seems to us, three views or visions of language in Canada. The simplest and most politically and morally bankrupt of these is that Canada is or should be an English-speaking country. The people who hold this view are in a distinct minority, but they are strong enough at times to stall legislation and intimidate weak politicians. Their narrow, bigoted vision is even intruding into Quebec lately.

The second vision or view is of a bilingual Canada, a vision based on the equality of the two official languages and the provision of a basic complement of individual and minority rights across Canada. This is the vision of which we have spoken and which we hold. This is the vision we believe is found in the 1982 Constitution of Canada, but it is also a vision that proves difficult for governments to realize.

In place of this, the best vision of Canada, there has arisen a third view. This view is one that sees Canada as a nation of duality. Canadians have until recently used linguistic duality and bilingualism interchangeably, but there is in the rhetoric surrounding Meech Lake an emerging definition of duality that is very different from bilingualism.

This notion of duality is based not on an inspired vision of the equality of two languages, but rather on the simple, social fact of the existence of two major language groups in Canada. In a pale imitation of bilingualism, this view some times works itself up to recognizing the presence of official-language minorities within the major language groups, but it does not hold up a difficult yet necessary goal like language equality for governments. It contents

itself with a simple description of, and therefore an acceptance of, the status quo. This is the vision of the country that lies at the heart of Meech Lake.

The view that duality and not bilingualism is what characterizes this country also allows governments to shirk responsibility for making language equality a reality. In our own province, it seems to be part of the thinking of a government that allows its language agency to revoke the bilingual status of municipalities and public institutions when the English-speaking population or clientele falls below 50 per cent. Bilingual status in Quebec does not bring with it, as in Ontario, a requirement to provide minority-language services. It is rather a dispensation from the prohibition of functioning in the English language. Nevertheless, bilingual status is of critical importance to a number of English-speaking institutions in our province.

The static vision of duality lies behind the Quebec government's rigid reduction of access to English-language schools in Quebec, the ongoing prohibition of the use of one of Canada's official languages on commercial signs, the threat to override fundamental rights if the Supreme Court decides that the sign law violates the Canadian charter, the clamping down on distributors of English-language movies in an attempt to give wider access to dubbed American culture in French. All these actions, we believe, are not inconsistent with the duality view.

Let there be no mistake: There really is a fundamental debate about the nature of our country here in the discussion of the Meech Lake accord. Let there also be no mistake: We have not come to Ontario to seek your direct help on the effects of this vision of Canada's duality in our province. We are ready to fight those battles ourselves. But we are here to say that we believe the Meech Lake accord, which you are charged with investigating and upon which you must give your opinion, compromises the bilingual vision of Canada and weakens our ability to defend our individual rights and our community's interests in Quebec.

The Meech Lake accord has been sold to us by the first ministers as a deal to bring Quebec into the Canadian Constitution. Alliance Québec has advocated publicly the importance of Quebec becoming a signatory of the Constitution. We have as well supported the idea that Quebec's distinctiveness be recognized within the Constitution, so long as the recognition of that distinctiveness does not compromise the charter rights of Quebecers.

We have always said that if the supremacy of the charter is recognized, then the Quebec government can take such measures to promote the French language as it sees fit. We were appalled, however, to see how the first ministers dealt with Quebec's demand that our distinctiveness be recognized. Section 2 of the Meech Lake accord outlines two fundamental characteristics of Canada, its duality and the distinctiveness of Quebec's society and says that the entire Constitution is to be interpreted in the light of these two fundamental characteristics.

But the accord does not include other equally fundamental characteristics of our country, such as the supremacy of fundamental and equality rights in the political life of Canada, the equality of the two official languages, the multicultural nature of our country and the special rights of aboriginal peoples. By not including these other fundamental characteristics, the accord creates a hierarchy of values that the courts of Canada must use to interpret the Constitution. We fear that this hierarchy of values will ultimately work against our interests.

There has been much debate about the implications of section 2 of the accord. Quebec says it gained powers by it; the federal government implies that it does not change anything. Obviously somebody is wrong. If, as Senator Lowell Murray and others have suggested, the duality and distinctiveness clauses of section 2 have little or no impact, then why did the first ministers go to the trouble of protecting the powers, rights and privileges of their governments in subsection 2(4)? Why did they add section 16 which states that section 2 will have no effect on multicultural and aboriginal rights as recognized in the 1982 Constitution?

Explicit protection for the rights, powers and privileges of governments, limited protection for multiculturalism and native rights, and no protection for fundamental rights or language equality rights: that is what we see here. As was suggested to you by l'Association canadienne-française de l'Ontario, this looks like a deal for the benefit of governments and not for individuals. This looks like a deal between linguistic majorities. The question has been asked, who spoke for Canada at Meech Lake? We have been asking for eight months, who spoke for the linguistic minorities?

The problems we see arising from the present formulation of sections 2 and 16 have a relatively straightforward solution. Either the supremacy of the charter is guaranteed by strengthening section 16 into a full nonderogation clause of

charter rights, or the other fundamental characteristics of this country must be added to section 2 to ensure that the duality and the distinctiveness of Quebec do not stand in isolation as the pre-eminent political values the courts must consider in interpreting the Constitution. Fix section 2 or fix section 16. Without that, this accord does not promote and enshrine the fundamental values that must be at the heart of our Constitution and our country. Without that, this accord should not be approved.

We have already been told in Ottawa and in Quebec that to open the accord would be to destroy it. We have said and we say again, if section 2 and section 16 of the accord do not work to compromise fundamental and minority rights in Canada, if this was not the intention of the first ministers, then make that clear in the accord. Most minority groups in the country have expressed concern about this issue.

If, on the other hand, the duality and distinctiveness clauses do have a potentially negative impact, then we respectfully suggest that you must put the question to yourselves and eventually to the first ministers whether the price of the Meech Lake deal was the supremacy of the charter and the rights of minorities.

These are our main concerns about Meech Lake. There are a number of other concerns noted in our brief, which you have before you. In our view, the accord is seriously flawed in a number of ways. Some of those flaws we can accept. We understand that the quest for perfection cannot be the enemy of progress, but in our estimation, Meech Lake fails to promote a vision of Canada's future based on fundamental principles of individual and linguistic equality. Therefore, the Meech Lake accord is fatally flawed. The basic values of our political life as Canadians are not advanced in this constitutional deal and we say it must be changed or stopped.

## 1020

Mr. Chairman, you and your committee must write a report on your findings. Are you prepared to write a report which says that the rights of Canadians are unequivocally unaffected by this accord? If you cannot come to that conclusion, are you prepared to say that compromising the rights of Canadians is an acceptable price to pay for securing the accord?

All legislatures in this country are being asked to pass judgement on this accord and all legislatures and legislators will bear direct responsibility for the actions that flow from this accord in Quebec. The best your colleagues in Ottawa could do in their analysis was the



following, and I quote from the report of the joint Senate-House of Commons committee published in September 1987: "In law, the 'distinct society' clause is unlikely to erode in any significant way the existing entrenched constitutional rights of the English-speaking minority within Quebec."

That must rank as one of the most disquieting reassurances in the history of Canada. Somewhere, sometime in this country there must be an honest debate on what Meech Lake means. Alliance Québec hopes that will happen here in Ontario. As Canada's only English-speaking minority, we face unique challenges in Quebec. We have committed ourselves to meeting those challenges as Quebeckers. We have never turned to other provincial governments to sort out our problems. Therefore, Alliance Québec has not come to ask that Ontario intervene in the affairs of Quebec. We do, however, ask you to take seriously your responsibility to give national leadership on constitutional and language issues. We therefore call upon you to insist that the following three steps be taken:

1. That the governments of Canada acknowledge their responsibility to promote both official languages.

2. That section 16 be redrafted to ensure the supremacy of the charter, and not just the equality provisions but the whole charter.

3. That you encourage your government to send a clear message to the minorities of this country by stating unequivocally that the government of Ontario will advocate in future constitutional negotiations the removal of the section 33 override clause from the Charter of Rights.

Alliance Québec's message to you is clear. Help us as Canadians to secure our basic rights and we as English-speaking Quebeckers will make things work for our community in Quebec.

**Mr. Chairman:** Thank you for your presentation as well as the brief you have presented to us and also for the specific recommendations in terms of specific things we can look at. I think that is very helpful to the committee in terms of looking at where it might be able to go. I will turn then to questions.

**Mr. Breagh:** The process is a difficult one to understand. With these hearings, we are trying to provide what probably, sensibly should have been done some time ago; that is, a mechanism whereby the public can present its points of view and we can sort out differences of opinion and agree with some and disagree with others.

I think what you do is a very good job of analysing what has happened so far, what is wrong and generally what the concerns are. In

what we have heard to date, I think the paramount concern is, what is the relationship between this accord and previous attempts to put in place a Charter of Rights for Canadians? We are coming to the conclusion, I think inevitably, that it does not matter how many times people say there is no impact and you have not lost any rights, that quite sensibly most people are saying, "It is at least open to question and there is some doubt there." Some are really saying, "We certainly have."

We have a political problem to boot. Everybody knows that no one wants to see amendments on this, or if they see them, they are happy to receive them, as the joint committee did, in the traditional parliamentary sense that opposition parties put forward their positions by way of moving amendments and they do not carry, so the government in a majority situation does not have to worry about such things.

I have been exploring what has been suggested by a few who have appeared in front of us, that ultimately this will be decided in a court. Why not put together a reference to the Supreme Court that does decide whether there is an impact on the Charter of Rights by the Meech Lake accord? I would be interested in hearing your opinion on whether that is a useful exercise for us to go through.

Just before you answer it, I think we have to put to you that our political problem is for real. It is no problem for us to move amendments here. The problem is to get them out of here into the Legislative Assembly. The problem up there is, how do you get them to carry? Then the problem is, how do you get them to carry in every other assembly across the country?

Even with minimal experience in parliamentary procedures, one could see that it could take well into the next century to get a simple amendment put through 12 chambers across the country; and when you have done that, it will still go to court. The suggestion is that perhaps we can provide the ultimate answer by doing a reference to the Supreme Court which answers that very basic question. I would be interested in your response to that.

**Mr. Orr:** First of all, I would agree with you about the strangeness of the process we have been going through. As you would see in our brief, we condemn the process. One of the most frustrating parts of this whole debate has been that we have not really functioned the way parliamentary systems should function; we have basically functioned without any kind of opposition, certainly at the federal level. You are quite

right that there was some attempt to suggest changes, but leaders of all parties had already given their support to the accord as it existed, and so one has to wonder how serious they were about any recommendations for change.

I should say as well about this discussion here today that your comments are the first time in one of these debates—and we have been through three of them at this point: in Quebec before the final text of the accord, and I will come back to that in a moment, in Ottawa before the joint House and Senate committee and before the Senate committee—that I have heard someone talking seriously about looking for politically saleable or workable solutions. What has happened up until this point is that I do not think any group of Canadian legislators or politicians has really given itself the task of thinking, “How would we actually go about a change if we believe there should be a change to this accord?”

That in itself, I think, is very promising. I should say too that while I agree with you that the procedure might become difficult and may be protracted, I do not think people should be scared off from the attempt to move changes through legislatures.

The government of Quebec chose to hold its public hearings before the final text, based in effect on a press release from the first Meech Lake conference. There was some serious debate about what Quebec’s bargaining position would be going into the final round of negotiations, or what turned out to be the final round of negotiations. That was a serious debate, particularly around the “distinct society” clause and whether or not that should be defined. The government of Quebec used that to go into the final negotiation and came out with the final text that they thought conformed not only to their position but to what they had heard in the public testimony.

It is a little bit more complicated now because there is a final accord that everyone had agreed on, but I do not think that legislatures and committees of legislatures should hesitate to try that regular parliamentary process and suggest that other legislatures or first ministers maybe should have another round or kick at the can in terms of negotiating.

If in the end it was decided that the reference case was the way to go, if that was determined as being the most politically saleable or effective way to go with those things, I think we would ultimately have to welcome that, but I think we would only welcome it if whoever launched that reference case gave an undertaking to get a

change or not to approve the existing accord if it turned out to compromise charter rights in an appreciable way.

We have had a lot of experience with governments moving into reference cases simply as a delaying tactic. If it is more than a delaying tactic, then it strikes me as an interesting possibility. But if it is simply a delaying tactic and the government will not undertake to be in some way bound by the decision, then I do not see its usefulness.

**Mr. Breagh:** We used that technique in Ontario recently to establish funding for Catholic schools. Central to that issue was not only whether that was appropriate for a Legislature to do but whether it would stand up before the Supreme Court. It was our conclusion that it would be pretty silly to proceed with something that was obviously going to be challenged without checking it out first by means of a reference. I think it was a reasoned and successful attempt to try to check the validity of your legislative proposal with the Supreme Court as quickly as you could and as squarely as you could. So the technique has been successfully used here before.

### 1030

I want to move ground a little bit, because the more I look at this, the more concerned I become with the process itself. It is clear that 11 people did meet in a room and write a constitution. Strange as it may seem, they were able to do that. It is clear that most of them will be able to go back to their assemblies and carry the day. Most have majorities. Even where there are minorities, there may be embarrassments and split votes and all kinds of things, but it is quite likely that the premiers will be able to deliver some version of an approval process in their own assemblies.

Despite the fact that they can do all of that, everybody else, of course, can go to court. Some are already on their way to court. The two territories have challenged the validity of this process and their exclusion from the accord; they have begun that already. There is every sign that a whole lot of other people are going to do this as well.

For practical purposes, what started out to be a deal cut in private has to turn public sooner or later. It cannot be avoided—I do not think it can be avoided—and it will not be avoided, in my view at any rate. People are going to use their rights to go to court. If the legislative and political process does not function, the only recourse they have got left is the Supreme Court, and that is where they are going.



I then become very concerned about what happens to this country over the next four- or five-year period. Supreme Court decisions are taking on a new importance in Canada, and I think quite a distinctive change is taking place there from what we are familiar with. That is one combination. The second is all of these other questions have been challenged before the court. Throw into that the fact that all the first ministers have a stated intent now to meet every year to discuss the economy and the Constitution and supposedly, it follows to my mind anyway, more changes to the Canadian Constitution.

It does not take long then to figure out that we are going to go through a whirlwind period where the first ministers will be proposing constitutional change, theoretically the Legislative Assembly of Ontario and others will develop a process of their own for bringing forward change and court challenges will be going on. It gets to be one hell of a mess in a short hurry here.

I am concerned about that, which is why I am wondering, is there some kind of reasoned approach to take with this? It strikes me we could get into an all-out battle, which will not do much for anybody. But if there is a reasoned approach that can be found, we ought to find a way through that and get it.

In my reading of the accord, I do not see much that I find fearful in terms of my own personal charter rights, but a number of groups are making a good argument that this does not really count; what counts is, is there doubt there? There is certainly doubt in the minds of many people, who believe they have lost some rights by means of this accord. If the doubt exists, then we have to address that.

I would be interested in your comments about process, about the dangers that we might go through in what I would hope would not be a long period. But certainly as it is set out here in the next four or five years, the Supreme Court is going to be really busy, the premiers of the country are going to be really busy and the law profession should be at an all-time high throughout Canada.

**Mr. Orr:** I think if you were an English-speaking Quebecker, your doubt about how your rights were affected would be a little bit higher than it is as an Ontarian.

But, that aside, I think the concern that Canadians in other provinces should have is less with what the immediate impact on their Charter of Rights in other provinces might be than simply with the process that was gone through and, through that process, the potential compromising

of the rights of a group of Canadians in an appreciable way. We think our rights were probably more compromised by this deal than those of people in other provinces, but again I do not think that should matter.

From the perspective of most Canadians, if the 11 men can get together in a room and make a deal and this is the result, then they can get together in a room and make another deal if this is the way we go about building our Constitution here in Canada.

On your observations about what we are heading into in terms of a difficult time, I think potentially we are. But the fact of the matter is that Canada is changing. I do not think that necessarily everybody has recognized the kinds of changes that are going through.

If I could, I would like to speak about language and the charter for a moment. First of all, in terms of language in this accord, there was no attempt by the first ministers to say that it is a responsibility of governments to promote both official languages or both language groups in this country. Through the whole Meech Lake process, the government of Quebec suggested that one of its goals was to secure better protection for French-speaking minorities in other provinces. The fact of the matter is that it did not secure that, and I think a number of the minority groups are suggesting that, if anything, it may have compromised their rights as linguistic minorities in other provinces.

I think with this whole Meech Lake process, with everything that is happening in the country and with the things that are happening in the provinces, we have to see that more and more Ontario and New Brunswick are being called upon to provide national leadership on language questions. Quebec is not necessarily providing the leadership it once did. Both Ontario and New Brunswick are taking major steps in terms of improving services and improving the acceptance of their minority-language communities.

I think inevitably in these kinds of debates, when language questions are touched, the governments of Ontario and New Brunswick in particular have a special responsibility to speak out and to convince other Canadians, including Quebeckers, that they are taking positive, important steps to improve the use of both official languages in this country.

Until that is accepted, until it is accepted that the government of Ontario has that national leadership role, until it is accepted that it is OK and expected in Canada now in these kinds of national debates that Ontario, at least, is going to

speaking out about language questions, we may be running into problems, but the problems arise more because of misperceptions of the new reality or failure to appreciate the new reality.

In terms of the charter rights, there again I think we are only now coming to terms with what it means to have a charter. Some of the very recent decisions, especially the abortion decision, I think are only just beginning to demonstrate to Canadians what it means to have a charter. It means you have created another important and essential pathway for democratic participation in a sense. That was the intent of the 1982 accord. That was the intent of having a charter. This is not an unreasonable thing. This is not an undesirable thing. In fact, in an increasingly multicultural and pluralistic Canada, it is a necessary pathway for democratic participation.

That is going to be difficult. There are obviously vested interests in terms of provincial governments that do not like to see that extra pathway of democratic participation. There are people basically who are part of majorities within those provinces or within the country who do not like to see that extra pathway of democratic participation. But the country has to come to terms with the existence of the charter and the implications of the charter. That is never an easy process.

I agree with you that we may be heading into a time when there are court cases all over and there are ongoing discussions and there may even be tensions created by it, but these are the new realities. The new reality is that other provincial governments are taking leadership on minority-language questions; there is a charter and people are starting to understand how to use the charter, and the rest of the system is having to adjust itself to that. Inevitably there will be stress, inevitably there will be tension, but that is what Canada is now, and we have to come to terms with that.

**Mr. Williams:** If I could just return to the question on the reference case, if the difference of opinion is whether your rights have been affected and the doubt is whether the charter is supreme but there is a unanimous principle that the charter should be supreme, then I think it would be incumbent upon all of us to correct that doubt prior to having the accord passed, instead of using a reference-case model, if there is unanimity on the principle that the Charter of Rights and Freedoms is the supreme charter.

**Mr. Breagh:** I would agree. The problem is that, as a legislator, the one fact of life I have to understand is that when I am through with the bill, somebody can always go to court; that is

where the fine print is decided and the final interpretation is put on any law. I cannot escape that. What I can do is expedite it.

**Mr. Williams:** I think under most conditions that is right, but we are talking about whether there is doubt about that legality with the charter, and if there is doubt let us clear it up before you have to go there.

**Mr. Breagh:** Normally I would certainly agree with you. Let me just conclude by trying to give you what I sense is a reasoned direction to move and get your response to it.

I think there is a need to resolve, as clearly as we can, this matter about whether your charter rights have been affected by this accord. Whether that is by means of an amendment or by means of a reference, I really think that is essential and that it will happen one way or the other; it is a question of whether it happens in a controlled circumstance or by happenstance. I think that is a major piece.

The second thing, though, is that I am really coming to the point of view that if we do not rectify this process—I would think if the first ministers gathered this year and attempted a repeat performance of last year, there would be howling of such substance, rightfully, from across the country as to make them incredibly silly if they tried to do that again.

#### 1040

But I do think part of our job is to put in place a process which in its simplest terms just reverses this thing. It should start with public hearings. It should go through the legislative assemblies across the country. It should end at Ottawa with some kind of a first ministers' conference where they put the fine print together or where they test the waters to see whether a final agreement is brought about and that there is some urgency to that.

If we allow this to go for a three-, four- or five-year period where there are court cases outstanding and things are suspended for a little while, I think we will create a whole lot of problems in a multitude of programs across the country as to whether or not they are legal. Governments will then hesitate to embark upon new programs in any area because they are not sure whether this is going to hold up in court.

I would like to get some sense from you, if I could, about the urgency of that. This is new to us. I think part of it is our angst that in Canada we have not had a constitution for very long, and unlike other jurisdictions, we are not quite sure what a constitution means. We certainly are not accustomed to the idea that the Supreme Court of



Canada on a Monday morning announces a decision and all across the country ministers have to rearrange programs and walk into press conferences and do not know what to say—which is a really unusual thing—because they are unsure of the ramifications of these decisions. The only thing they do know is that what was legal yesterday is not legal today, and a government all of a sudden has to respond, and sometimes that response takes place all across the province in every hospital—in the latest decision—in almost every kind of legal situation that you can think of. There will be twists and turns to the decisions of the Supreme Court.

We are entering into an era where the basic rules of how our country operates have been altered somewhat, and I believe there is some urgency in having our political process adjust itself so that people by and large, as quickly as we can, recover faith in their political institutions, there is a process that makes sense to them, they see where they fit in that process, they have an opportunity to participate and make their views known and there is an openness to it.

We have talked with a number of groups about this. I am trying to get some assessment of whether the process really may well have put the Meech Lake accord in great difficulty, whether it is good or bad, just because the process was flawed severely. I would like to get your impression of where we go from here.

**Mr. Orr:** I agree with you that the process was enormously flawed and that we as Canadians must take several lessons from this and not allow ourselves to go through this again. On the other hand, we have this accord before us. It is through some legislatures; it is not through others.

We are being put in this really unacceptable position—particularly unacceptable for English-speaking Quebec—where we are told to accept this accord or create chaos, whether that chaos be resurgent nationalism in Quebec or some of the things you outline in terms of delays, attempts to clarify and things getting stalled.

My sense is that this is a situation we should not have been put in by the first ministers. I pin the blame on the first ministers not solely for the content but almost as much for the process. How could they have let us get into this situation is, I suppose, the obvious question.

I think you are right; there is a new reality that is developing. We are very ill prepared for that new reality, as I said before. That new reality not only affects how ministers and government must react to decisions but it obviously affects how we

go about making changes to this Constitution now that we have a Constitution.

I really wish that the governments had thought a little bit about this instead of approaching these negotiations almost as a contract-settlement negotiation. There are appropriate ways to negotiate different things, and this was an inappropriate way to negotiate this.

I have no easy solution to the situation we are heading into now or the problems we are heading into. All we are saying is that the price of this accord going through, or even the price of the lesson we learn as Canadians about the process we must go through, cannot be to compromise the fundamental freedoms of English-speaking Quebecers.

I think any slowdown is going to result in problems. I think it is going to become a political problem for those politicians who are courageous enough to say: "No, this is not right. This cannot proceed in this way. We have to look at a different way, whether it is a combination of court-reference cases, plus further negotiations plus further discussions." I do not know what that complement of actions would be, but I think we are fast approaching the realization that this kind of large effort has to be undertaken. The implications are just too great, not just the implications of what the content of this accord is, but as you point out, the implications of further discussions and further changes to the Constitution.

I do not think we, as Canadians, can for a second time hold our noses and pass a constitutional deal. We did that last time and we have the "notwithstanding" clause. If we do it this time, then I think what we have is a compromising situation, certainly for English-speaking Quebecers and probably for minority-language communities right across this country, and the establishment—if it is not established as the regular way these things are dealt with—of a certain precedent that, on questions of extreme national interest like bringing Quebec on side in the Constitution, it is OK for 11 guys to get together in a room and come out with a deal which they not only agree on but also have all promised to get through their legislatures.

**Mr. Morin:** You mentioned a price for Quebec joining in at the expense of the others. What about if Quebec decides not to join? What price would that be in your opinion?

**Mr. Orr:** We, as Alliance Québec, have always advocated that Quebec needed to be a signatory to the Constitution. We have stood behind that. Actually, we stood behind all five

principles that the government of Quebec, Bourassa's government, announced shortly after it came to office. We have supported the notion of recognizing Quebec's distinctiveness in the Constitution. We simply have said that this should not be there in isolation, that other fundamental characteristics should be recognized. We have supported that whole list of things.

The problem is that we have been put in a situation as a community of being asked to choose between a bad deal and Quebec perhaps feeling even more isolated within Canada. I think some of the suggestions of what would happen if the deal fell apart are a little bit extreme. I do not think it would be the occasion or the reason for a terrible resurgence of nationalism. As a matter of fact, I think nationalism will continue to exist in Quebec and will use whatever constitutional or political resources it has to advance its political agenda.

I think it is essential that we, as Canadians, bring Quebec into the Constitution. I think it is essential, though, that we do this in a way that is open, democratic and respectful of the steps forward we have already taken, primarily the establishment of the charter. I do not see that as an easy process. I think what the first ministers did was not resolve a problem but create a whole set of new problems for us. This is not a deal that resolves the fundamental problem of the Constitution of Canada. This is a deal that creates a whole host of new problems and could create even more problems if it is not fixed.

We are saying this deal should not be allowed to disappear, should not be allowed to fail, but it has to be changed; it has to be improved. As I said earlier, it is only when groups such as your own and it is only when governments such as your own take on the responsibility of finding the ways to change, of convincing Quebec that these things are important enough to your government that they must be changed and that these things will not compromise the legitimate gains Quebec has made in this accord, that we will be able to start moving towards that.

I do not think legislators in this country should see their options as accepting this accord as it is or allowing it to fall away. I think your responsibility is much greater than that and is much more difficult.

**Mr. Orr:** Thank you very much for your presentation. In my question, I would like to pick up on the last point Mr. Morin brought forward. It seems from your presentation that you are saying you applaud the fact Quebec is now part of

the constitutional family, but that with respect primarily to section 2, this could result in—I wrote down this phrase—"compromising fundamental freedoms." We have heard from other people that it might be, and I think it is the same thing, a diminution of rights. Is that a fair assessment of the concern you have with respect to section 2?

**1050**

**Mr. Orr:** Especially when section 2 is taken in consideration with section 16. I think the two necessarily work together.

**Mr. Orr:** On that basis, we have heard from some people who have said that section 2 is an interpretative section, that it conveys no rights, and from others, that it may not be as clear an interpretative section as one might want. We have also heard, I think it is fair to say, that accepting section 2 as an interpretative clause, its use as an interpretative clause, may affect rights.

Carrying on from that point, I am sure you are well aware of section 1 of the charter that talks about the "reasonable limits prescribed." My question most specifically to you is that in Quebec, in dealing with matters for judicial determination, for judicial interpretation, is that not basically how they are proceeding right now? Have not the courts in many ways indicated that Quebec has a distinctiveness, that they take a look at the issue they are deciding, that they take a look at the realities, for instance in this case, of Quebec, and that they then go that next step and say, "Yes, this is the matter at hand, but is this a reasonable limit 'prescribed by law as can be demonstratively justified in a free and democratic society'?"

From that preamble my question to you is, as to your concerns with respect to the compromising of fundamental freedoms, are those safeguards not being used by the courts right now and have they not been used by the courts in order to address your concerns as they exist right now?

**Mr. Orr:** You say "right now." Let me attempt to answer that by saying that I think you are right. When they are looking at a section 1 argument launched by Quebec, the courts have said, "Let us take a look at Quebec when we are trying to decide whether this is demonstrably justifiable."

But the fact of the matter is that what we are looking at after the passage of this is, if not a whole new ball game, at least maybe another base on that ball field. What we are looking at is an accord which says explicitly that there are two fundamental characteristics which are interpretative of the entire Constitution. That section 2 is



going to go into the Constitution as section 2 of the entire Constitution, so it is not just the onus of this accord. The entire Constitution is to be interpreted in the light of duality—it does not say “duality,” but it says it in a longer format—and the distinctiveness of Quebec society.

That clause also goes on to suggest that there are certain impacts or, in this case, no impact on the powers, rights and privileges of governments. It goes on to say of the distinctiveness of Quebec society that the other governments have a responsibility simply to preserve one of those fundamental characteristics, duality, but that the government of Quebec has the role—it is not just that its role is “affirmed”; in French it says it has the role to protect and to promote the other fundamental characteristic; that is, distinctiveness.

Add to that section 16 and *inclusio, exclusio* and all those principles, and I think what you are looking at is maybe the courts now are thinking about some of these elements; but after this accord is through they will be required to think about these elements, they will be required to take these things into account. In their reasoning, they will have to deal with the interpretative clauses that are imposed upon them for a question that may touch language in Quebec. Obviously, it is a guessing game exactly what the courts will do with this kind of accord, but what I think we see here is that in a number of ways that combine together, there is a very real question about whether fundamental freedoms in Quebec may be compromised by this deal, whether fundamental rights in Quebec will be different from those in other parts of the country.

If we use a specific example—the signs case on which we are currently awaiting a decision of the Supreme Court—you are right. It was a section 1 case that was made. The government of Quebec went and tried to make all the arguments to demonstrate that it was reasonable and acceptable in a free and democratic society. They have not been able to make that case in the lower courts. We await to see if the Supreme Court will have that. Clearly, one of the things they would do in a freedom-of-expression case is to try to use the “distinct society” clause of the accord in a much more aggressive way than they would be able to do now, because “distinct society” does not have any standing in law until this accord gets through.

They may claim that Quebec is distinct and they will have to make the argument that it is justifiable because it is the only French-language province, etc., but they are not able to go in and

say it is a distinct society. What constitutes that distinct society? We can make arguments based on existing legislation about what constitutes that identity they are supposed to promote. Basically, what we see in this accord is a whole series of precisions and more arguments that the government will be able to use to strengthen the kinds of arguments it is already making.

**Mr. Williams:** Perhaps I could add that following the passage of this accord, the Minister responsible for Canadian Intergovernmental Affairs in Quebec, Mr. Rémillard, said that those articles would facilitate use of section 33, the “notwithstanding” clause, to circumvent the issues of freedom of expression as outlined in the charter. Back in Quebec, he clearly told the province his intentions on how this accord could be used if they so wished. I think the intent is quite clear.

**Mr. Orr:** I appreciate that final comment. I know there are other people on the list. I just want to ask one final question.

It seems that when people come before this committee and talk, as you have today, about concerns found within the Meech Lake accord, I sense that what they are doing is just looking at the accord itself, and as you brought out today, are not taking a look at the charter's section 1, the limitation provision of the charter. I think it is an important aspect to bring out, to say that we are concerned about how this section of the Meech Lake accord will be used as an interpretative section.

We are concerned because, in its interpretation, it may result in the compromising of some fundamental freedoms. But I think, and I suggest to you, that, first, one must also keep in mind section 1 of the charter, the limitation provision, and second, with respect to the concerns one has with respect to the judicial interpretation, the courts have already, in one way or another, dealt with an acknowledgement of the distinctiveness of Quebec society and have looked at that distinctiveness in terms of a particular question and in terms of section 1.

I am wondering whether that fact does not in some way ease your apprehension, and weighing that against your initial point you brought forward today—that you want Quebec in the constitutional framework, the constitutional family—ought not those two points be weighed, one against the other?

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**Mr. Orr:** I think most minority groups in Canada are ready to say: “We can accept section 1 of the Constitution. We are prepared to go into

court and argue before the courts and have the courts decide whether a particular law is demonstrably justifiable in a free and democratic society." That is the basic rule of the game. That is acceptable. That is what charters are all about. You get to go before somebody and explain it.

In this case, what we are looking at is a kind of stacking of the deck. It is not simply that we are going to go in and discuss these things. We are now going to go in and discuss these things in the light of certain interpretative clauses, certain elements of Quebec society that must be, that are required to be, part of the court's decision on these things. It is not simply that those two characteristics are noted. Then other arguments, as you well know, can be made on the basis of what is "promote," what is "protect" and what is "derogation of government powers"?

"Derogate" suggests nothing can be taken away, but it does not say nothing can be added. In section 16, while some things are *inclusio*, some things are *exclusio*. The language in section 16 just says "affects," which means it can be neither increased nor decreased. You know as well as I do that all those arguments are then drawn out to give weight to section 2. Everything is pulled together into a package to try to demonstrate in any particular instance that on some particular freedom, probably freedom of expression, compromising that freedom is justifiable.

It is not that we do not accept that we have to go and do the arguments around section 1. It is not that we do not accept that when we go into those discussions from Quebec, one of the things we have to talk about is the distinctive elements about Quebec society. But this seems to us to be really giving the courts a signal that there are certain things they must consider when they are dealing with Quebec that are very different from other parts of the country. I think the implication of that is that rights are going to differ from one province to another. I think that could be the implication of this. It is not just based on a court decision; it becomes constitutional. If it is in the Constitution plus there are decisions—it is bad enough if there is just a decision, but if it is a reinforcing of a constitutional provision, then that becomes the law of the land.

Beyond that, I think the question has to be posed, because it has never been answered directly by the Quebec government: Was it their intention to compromise fundamental freedoms? I think it has been said here that a number of groups have come before not only your committee, but also other committees, and said: "We are very concerned about what has happened here.

We are very concerned that the result of this, intended or unintended, may be to compromise freedoms." It is difficult to say because this is a difficult call to make and game to play, but that is our concern.

I think the question should be put to the first ministers: "Was that your intention? If it was not your intention, it seems to us a reasonably simple change can be made in the accord to make that clear."

**Mr. Eves:** I am perhaps somewhat more naïve or somewhat more hopeful than Mr. Breaugh with respect to amendments. I do not think a wide package of amendments is going to carry the day, but I think your suggestion with respect to the amendment to section 16 is one that may have some chance of succeeding. Numerous groups that have appeared before us, women's groups and others, have indicated that the rights established under the Charter of Rights and Freedoms should be made totally clear and should be clarified.

I quite agree it is very ambiguous in the way the Meech Lake accord is worded right now. It seems to me to need a simple, all-encompassing amendment such as you have suggested that any rights or freedoms that have been accorded to Canadians under the Charter of Rights and Freedoms should supersede and have primacy over the Meech Lake accord. That seems to be a fairly simple amendment.

We have heard every one of the 11 first ministers, one way or another, indicate that was their intention. If that was their intention, I do not see how making such a simple amendment to clarify the situation once and for all so that there can be no argument constitutionally, legally, one way or the other, could not carry today and why that would in any way, shape or form, even remotely jeopardize the agreement they have struck. It is clarified. That is what everybody says they intend.

I also hold out some hope this committee will evaluate the process. I think we all agree that the process that has gone on to arrive at the accord is not sufficient and certainly is not a very open process, with almost no public participation whatsoever, save and except perhaps the province of Quebec in between the first and second drafts. I think this committee will come up with some recommendations with respect to process and, hopefully, that wrong can be addressed in the future.

I would like to touch on a couple of items that you have not expanded upon too much in your brief. Every brief, of course, and every group



comes at it from a slightly different point of view, and that is good from our perspective because we see and hear all different types of arguments and concerns that various groups in society have with the accord.

With respect to native or aboriginal peoples and their rights and their pursuit of self-government, the groups that have appeared before this committee so far have indicated that they regard it as almost the ultimate insult that they are not even included as an agenda item in the next round of constitutional talks. One suggestion they made to this committee was that perhaps they could be included and have some primacy over Senate reform and fishery rights in Canada. Would you concur or not with that suggestion?

**Mr. Orr:** Obviously, I do not speak for the native groups in any way. Our suggestion for a couple of years now has been that if they were trying to bring Quebec into the Constitution and part of that process was to recognize the distinctiveness of Quebec as something that is fundamental to this country, then they would almost necessarily have to try to define the country more fully, to say what is fundamental to this country.

On our list of what is fundamental to this country there has to be some mention of the aboriginal peoples and their special place in this country. Again, exactly how that is said, I do not know. It would be presumptuous of me to suggest how that should be said. But what we have said is that if you set yourself the task of trying within the Constitution to define fundamental characteristics, then you cannot overlook native people and native concerns. Even if you do not fully deal with the question, just in taking that approach, the Constitution requires that you in some way give recognition to that fact.

So yes, we are supportive of the notion that native rights have to be addressed and native concerns have to be part of the constitutional process we are going through. What we say is that if we are building a Constitution, it has to pull together all the elements that are constitutive of the country. If we are trying to put forward a vision of the country, which is in one way what a constitution is, then that vision cannot be exclusive, that vision has to include all the major elements.

The Meech Lake accord takes a couple of tentative steps in the direction of defining the country; but the way they have gone about establishing a process or the way they are setting up to deal with constitution-building probably

guarantees that some of those other fundamental characteristics of the country will not be recognized as fundamental characteristics.

It seems to me that if in this round or in this deal you are trying to start that process, you have to do it all or you have to do just about all of it, because we now seem to be in a situation where if this does go through everybody is going to be a lot more alert next time around. Probably next time there will be much more debate and there are going to be possibilities, as the people from the north know, of blocking a number of essential amendments to the Constitution.

With this accord, we are not only creating a partial definition of the country, a partial definition that could be used, we think, in a way that compromises our interests, but also a new process, not just in terms of the negotiations but in terms of vetoes, etc.

It seems to me the fundamental difficulty is that a number of groups are not recognized, their interests are not recognized in this accord; we are creating a process that probably guarantees that they will not get recognized. It would have been much more encouraging if native concerns and some other concerns, such as multicultural concerns, had been put on the agenda as the primary issues that had to be dealt with and not simply relegated to section 16 in what appears to be an attempt to mollify a political reaction from those quarters.

As far as we are concerned, all it did was compound the problem of section 2. I just do not think their perspective was clear on how they should be dealing with the legitimate concerns of a number of constitutive parts of the country.

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**Mr. Eves:** One of those parts may well be Canadians living in the Northwest Territories and the Yukon. I wondered if the Alliance Québec had any specific position on that.

**Mr. Orr:** In terms of a specific position, from our perspective this deal is a deal that the majority struck. A whole bunch of minorities, be they geographic, linguistic or multicultural, were simply ignored. There were attempts to put some of these groups into section 16 clauses. As I say, that just compromised the problem with section 2.

Some things were just not addressed at all, like the northern peoples' concerns. To impose colonial status on the people of the north, probably in perpetuity, does not strike me as a particularly progressive way to approach the Constitution.

From our perspective, the bottom line is that when those 11 guys got together in the room they were not thinking about the northerners, they were not thinking a whole lot about English-speaking Quebecers or French-speaking Ontarians. You can just go down through the list. That is what I think happened.

**Mr. Allen:** I am especially pleased that Alliance Québec has been willing to come and speak to us in the course of these hearings. I am very mindful of the very helpful and progressive position the alliance has taken with respect to minority rights issues in Ontario, where you have supported developments such as Bill 75, French-language governance rights, and you have made public statements and even taken out advertisements in our newspapers from time to time to tell us what you thought. We have all felt that was a very helpful part of the process, the political settlement of affairs in this province. So I am pleased that you are here.

I am pleased also that you are the first of, I hope, a number of groups from Quebec that will come to us and tell us what the accord looks like from the interior of Quebec and Quebec politics, and can those then be set against the politics of the nation at large.

I am not entirely persuaded that we have lost all balance around the distinct society question in Meech Lake and I would like to hear more from you in that regard. I look at the construction of section 2 and I see that while it is true—and I would certainly lean to the side of those who suggest it—that Quebec does gain some new power out of this arrangement, because it is recognized explicitly for the first time in the Constitution that Quebec has a specific role with respect to the preservation and the promotion of a unique and distinct society in Quebec.

That language has never been in our Constitution before, even though some elements of the Constitution have recognized the difference in allowing the French and English languages in the courts, in the Quebec legislature and so on, and factors like that, and the sort of tradeoffs in the separate school systems in section 93 have had intimations of that; but that language has never been there. So the fact that it is there at all—while it is interpretive it is also substantive—I agree with you that does add some additional power, no question.

If you look at that over against your concern about a minority like yourselves in Quebec, there is also the part of section 2 that says it is equally fundamental that this nation beds down on a kind of cultural and linguistic dualism. Whatever else

one says about other cultural groups and languages, that is where it beds down in terms of fundamental culture and language. Others, such as the Parliament of Canada, have a role in maintaining that dualism.

There is set up, in the tension between subsections 2(2) and 2(3), a tension between what the provincial government might do to promote distinctiveness and what the Parliament of Canada may do to protect dualism, if in fact Quebec would trespass on the principle of dualism itself, which is embedded in that section. It is not only presumably obligated in that section to promote, but also to preserve and to protect dualism. There is certainly that element in that section.

I wonder if you do not sense that, in that there are more tradeoffs than you have been willing to allow or more protections than you have been willing to state this morning in that section which includes the “distinct society” language.

**Mr. Orr:** Let me start by saying that the alliance has, as I said before and will just repeat, supported and advocated the recognition of the distinctiveness of Quebec within the constitutional accord. But what we have said is that that distinctiveness is not to be promoted at the expense of fundamental rights. Our position has always been yes, recognize the distinctiveness of Quebec, but recognize at the same time the primacy of the charter, and not just the fundamental freedoms, although those are important, but also some of the other charter rights, like section 23 rights.

The fact of the matter is that in Quebec we have not yet had to go with a section 23 case for management and control of our school systems, but the reality is that the section 93 guarantee for our school system is an increasingly hollow shell in terms of protection. Half of the English-speaking students in Quebec are in Catholic school systems with no minority representation and the other half are in school boards that are becoming increasingly French Protestant. At least two school boards over the next five or 10 years will become majority francophone institutions in our province. It is beyond simply the fundamental freedoms question.

Having said that we support the notion of distinctiveness, as long as fundamental freedoms and other charter rights are protected, the dualism or the linguistic duality clause, as near as we can see, is just a simple kind of definition of the status quo. It is not a statement about language equality in this country. It is not an injunction in any way for the governments to do



anything to promote the presence of either official language in any particular jurisdiction. It does not suggest that governments have to strive for a heightened use of either language. It is a very weak-kneed little piece of writing as far as I can see. It certainly does not go anywhere towards promoting bilingualism in this country.

Basically it is a statement about the status quo and a responsibility for governments to preserve the status quo. How do we interpret that status quo? At least some commentators have suggested that this might even be used by people who oppose bilingualism programs. That clause could be interpreted to say, "Look. This is the reality of our province. There are French-speaking and English-speaking." It is not for the government to promote bilingualism because the Constitution says it is French-speaking and English-speaking. They are like separate groups of people and there is nothing to suggest that is something that is defensible. It is not me who is making that argument. Bryan Schwartz from the University of Manitoba has made that argument in his analysis of Meech Lake.

Again, I sense that when the first ministers came up with section 2 they tried to balance the "distinct society" clause with the linguistic duality clause. If that was their intention, then I commend them for it. If they really thought this was the best way to articulate the reality of the official languages in our country, then I guess that was the best they could come up with. But looking at it afterwards and reflecting on what it means, especially reflecting on the difference in language between "preserve" and "preserve and promote," I think we have to say that this is probably not the best way to articulate what the reality of language in Canada is; or better, what the reality of language in Canada should be, because it seems to me that the real problem with that clause is that there is no vision there.

There is nothing for governments to strive for. There is nothing there that we as a minority group can use to take to the courts to acquire something further on the part of government. It is simply a static statement about the current situation with nothing that gives anybody anything. I suspect l'Association canadienne-française de l'Ontario, for example, would support the perception that it really does not give anybody anything.

All it does is at one level prevent minority groups from using that clause to go and suggest that governments should be doing more to promote, because it does not say promote. At worst, it might be used in conjunction with the distinctiveness clause to suggest there are strong-

er powers accorded to the Quebec government here than to other governments. Again, it is difficult to say exactly what that means, but my reading of that duality clause is that it is a pretty weakening piece of writing.

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**Mr. Allen:** ACFO did indeed raise some serious questions before us with respect to the way in which the language seemed to suggest that the association was a museum piece to serve preservation rather than promotion in Ontario. I certainly sympathize with that. My own reading of that section made it appear to me that at least your position as a minority in Quebec might in the language on some interpretations at least be stronger than theirs here in Ontario simply because if one were to read "distinct society" as including the concept of dualism, there is at least the language of promoting that element in the Quebec case as distinct from the obligations on the legislatures outside that province.

Let me allude to two other items in passing. Clearly, resolving this question raises some other questions. First, how far in the course of this debate do we downplay the significance of the actual accomplishment of the charter? One almost senses in the play of debate and the presentations that come before us that now that we have Meech Lake and somebody wrote down a document a few weeks ago or a few months ago, therefore, what was done a few years ago in the charter has somehow or other lost its significance, lost its force, does not stand as a paramount accomplishment of Canadian federalism, which necessarily impacts on all aspects of our constitutional life in this nation. While one likes, and sometimes does hear in law, the language "for greater certainty," one will repeat something that is already present in the Constitution, I am not entirely convinced how necessary that is.

Second, there is the question of the status of the Charter of Rights and Freedoms in Quebec itself, which of course does have reference to minority rights in it and provides a base for reference for the existence of court decisions in Quebec, like the one on Bill 1 which totally put the blocks to the provincial government's attempt to reduce the status of the Montreal school board to its original 1867 proportions in order to take over a whole terrain there of educational powers. The courts stood up very strongly in that particular case, so there are a number of capacities of reference, if you like, and supports that exist for you.

None the less, I want to come back to the central question in debate, which is that when we resolved the problems of the Constitution to the extent that we did in 1982, we did it on the basis of a charter which acknowledged a whole series of individual rights, but we did that very conveniently by putting to one side the biggest question of collective rights in the country, namely, the rights of an established large minority in the country which happens to be a majority in a province and, therefore, substantially has control of the single province when it wants to.

I am reminded that the Supreme Court of Canada, which is supposed to be the vehicle for the defence of individual rights under the charter, was no more balanced in the way it went about the abortion decision, for example, because it did it quite in its own language by putting to one side the whole question of the foetus for future determination. Whatever one thinks about that, that was sort of a halfway decision that left some other things to one side, just as the constitutional process did, so the courts in the constitution-making process have their limits in terms of the protections they give at any given point.

My sense is that when one deals, for example, with the rights of a collective majority which in turn is a minority, like the French community in Quebec, that government and that people are not in the same position in the overall texture of the nation as the English majority is in Ontario. You do not have to do anything to defend or even promote the English language in Ontario, although in looking at the results of the school system, some people might say perhaps you need a *Régie de la langue anglaise* in Ontario.

Inherent in the process is there not going to be an assertion of a collective right that pertains to Quebec, that is always going to exist in some tension and leave you in some doubt with respect to individual rights, which you will always have to go to the courts to settle, and therefore any attempt to really square that off so that you have it perfectly solved in Meech Lake or anything else is an inherently impossible task?

**Mr. Orr:** On your first point about the Quebec government's powers to promote its being a distinct society and English-speaking Quebec being perhaps part of that distinct society and therefore our situation being better, I simply would say that you have to be very careful. What the government of Quebec is to preserve and promote is the distinct identity, because the language is different between one section and the next. If you are looking around to find out what

constitutes that distinct identity, precise language is used in legislation on record; that is, Bill 101. If you look at the preamble to Bill 101, you will find a definition of what the distinct identity of Quebec is. I am not suggesting that is necessarily what was in the minds of the first ministers, but it will certainly be in the minds of lawyers when they come to argue that kind of case. That is one point.

On the second case, about the jurisprudence being a factor in decisions on certain things, you are quite right. On questions around section 133, for example, or section 93 in the Bill 3 case, in the *Blaikie* case about Bill 101, there is a very solid record of decisions. But on things like section 23, particularly around management and control on fundamental freedoms questions, there is very little jurisprudence about the situation in Quebec and how Quebec legislation may or may not impact, may or may not be interpreted or may or may not be accepted.

On the other point, about collective rights, this is of course a debate that goes on incessantly within Quebec and that we as Quebecers have among ourselves all the time—individual versus collective rights. I think you are quite right that there is something very different or distinct about Quebec. Basically, our position is that of a minority within a minority. We understand that. We understand the necessity of the Quebec government's taking steps to promote the French language. We have always accepted that; we have always supported that. What we have always said, though, is that it cannot be done at the expense of fundamental rights; our fundamental rights as Quebecers must be respected in that whole process of advancing what are seen as collective rights.

I have to question, though, whether "collective versus individual rights" is the right terminology to use in the Quebec context, because you are dealing with a collectivity in that case which is also the majority that controls the Legislature. Is it a collective right to have untrammelled parliamentary power? I do not think so. I think collective rights are something much, much more precise and much, much more controllable or definable. The way the term is used in Quebec often suggests that there should be no restrictions on the National Assembly, that it is a collective right simply to run the province almost. The reality is that that collectivity is also the majority, the very large majority; that collectivity will always control the National Assembly.

Things like language questions in Quebec are not so much collective rights questions; they are



more like what we in Quebec call *projet de société*. The debate is not whether collective rights or individual rights will be pre-eminent; the question is, how far is it legitimate to use the power of the state to realize this *projet de société* of increasing the use of the French language? I think it is much more the power of the state in individual rights than individual versus collective rights on language questions in Quebec.

I agree with you that there will no doubt always be tensions on language questions and that there is no magic solution to putting these things in the Constitution. I remind you, though, what happened when the most nationalist government we have ever had, the government of Mr. Lévesque, looked at these two questions. In some ways, we have two fundamental challenges before us in Quebec: one is to protect and promote the French language; the other is to develop a democratic society that is respectful of fundamental freedoms.

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Quebec has one of the best human rights charters in the world; and I should note that on both the Canadian and Quebec charters, we have won the signs question in two levels of court. The Quebec charter is a fine charter. It is a very effective document. We know its effectiveness. But even Mr. Lévesque's government never suggested that Bill 101 should have pre-eminence over the Quebec charter. That was the resolution of that tension that Mr. Lévesque's government came up with.

We have two laws in Quebec that are called charters, the Charter of the French Language and the Quebec Charter of Human Rights and Freedoms. The decision was that the Quebec Charter of Human Rights and Freedoms was to be pre-eminent. That was the decision at the time. I still think that is the decision we should have. I certainly think from a Canadian perspective, when we are talking about the Canadian charter that should be our perspective on things.

In the end, if the government of Quebec decides it is going to use the "notwithstanding" clause, once it has gone through the courts and the pre-eminence of the charter has been recognized and reinforced by those courts based on a strong Canadian Constitution, then I guess that is something the Quebec government has to consider, although I think we should be all of us working to get rid of the "notwithstanding" clause. But that is something the Quebec government has to consider.

I do not think it is for the Canadian political system to be thinking these things through and

trying to decide just on what side of the fence you come down on collective or individual rights. It seems to me the Canadian system, the way we have been heading and the way we are heading, should be concerning itself with reinforcing the charter, reinforcing the protections, reinforcing the development of this whole new avenue for political participation by people who are otherwise cut off from winning just causes. I think we should be pushing that forward.

The question of collective rights in Quebec, I think is a very complicated question. It is a question that brings about a whole discussion of the powers of the state and the rights of individuals and just what you mean by collective rights, etc. I do not think it is the Canadian political system's responsibility to sort that out in Quebec; it is for us to sort that out as Quebecers within Quebec.

On the other hand, I do not think the Canadian political system should be shifting the balance one way or the other with an accord like this. My sense is that this shifts the balance towards a certain interpretation of collective rights, which I see as more unrestricted use of the power of the state.

**Mr. Allen:** Thank you for that very helpful answer. I appreciate that.

**Mr. Cordiano:** May I comment, Mr. Chairman?

**Mr. Chairman:** OK; but I still have two people who want to ask questions.

**Mr. Cordiano:** Very briefly, I just want to make an observation or a comment that may have been covered previously; certainly it has been discussed in our deliberations with other groups. There is a recognition by some that what clearly constitutes Quebec's distinct society is a number of elements and not just the French-speaking element; there is an English-speaking element and there are other people of different origins—in other words, from other ethnic groups—who constitute Quebec society. Would you agree with that view?

**Mr. Orr:** There is no question. We actually fought rather hard for that view in Quebec City when we did have public hearings between Meech Lake and Langevin. There was a whole debate in Quebec about whether or not Quebec should go back into the negotiations and ask for a definition of distinctiveness based on the French language. The decision was—and it is a little bit ironic, because this argument was not used with respect to section 16—that to define in terms of the French language only would limit the impact

of a clause recognizing the distinctiveness of Quebec society.

I support that. The alliance supported that. We believe we are part of what is distinct. We are the only English-language minority in this country. We believe there is a whole host of things that are distinct: the civil law courts, the Caisse de dépôt—you can go through the whole list. It is a distinctive part of Canada. But that being recognized, that recognition has to take place in a way that does not compromise any elements of that distinct society. That is our concern now. That is why we are suggesting that section 2 as it is written, taken in conjunction with section 16, compromises the rights of a part of that distinct society. That is our perspective, that that is a possible implication to this.

We are told by first ministers and by some people in governments that this was not the intention, but I think enough minority groups and enough respectable jurists have stepped forward and said this is a cause for concern that if the first ministers really did mean that this was not their intention then it is a relatively simple thing to fix that. If they did not intend to compromise fundamental freedoms, if they did not intend to step back from the charter in any way in this process, then they should make that clear. That is not that hard.

**Mr. Cordiano:** The difficulty I have with that is that there certainly is a lot of language expressed in any constitution. This is a point that certainly has been made over and over again, but any number of expressions in this Charter of Rights and Freedoms, for example "free and democratic society," any number of these expressions that we use in constitutional phraseology are vague to a certain degree. What do they mean? We leave that to interpretation in every case. I think there is a great deal of interpretation being exercised.

**Mr. Orr:** I agree.

**Mr. Cordiano:** But the fact that we have a charter implies that we are going to have, as my colleague pointed out, a series of litigations before the courts, with groups coming before the courts seeking justice in their own eyes and using recourse to the charter as a means to do that.

**Mr. Orr:** Let me just share with you the message we, as English-speaking Quebecers, received after this accord was put through. I think what happened in a lot of provinces was that first ministers came running back, clutching this deal in their hands, and saying: "We've got this great deal. We've brought Quebec back in. And by the way, we've got a few extra powers."

What we got in Quebec was quite different, because when Mr. Bourassa and Mr. Rémillard came back to Quebec the questioning was pretty tough. The questioning from the media was: "Well, did you get anything? Did you really get anything in this deal?" Obviously we in Quebec are a little preoccupied on these kinds of questions. These are the kinds of questions you face when you come back with a supposed deal.

In response to those questions and to some tough questions about whether they got anything, Mr. Bourassa in rather vague terms and Mr. Rémillard in very direct terms said that yes, they believed, with the "distinct society" clause, they would have ammunition—and the issue that is always debated, of course, is the signs case because it is before the courts—to go in and make a stronger case for infringing the freedom of expression. We already know from two court decisions that the freedom of expression is probably compromised unjustifiably by this legislation.

Mr. Rémillard said, "Well, I think we've got this." Mr. Bourassa and Mr. Rémillard said, "We think we've got more ammunition to go back in and fight this one," basically to compromise fundamental freedoms from our perspective, freedom of expression. Then Mr. Rémillard said explicitly, and Mr. Bourassa said in a radio clip, that in the end what this did was give political justification for the use of the "notwithstanding" clause, even if they did not get any accrued powers.

That was the message we got when this deal was brought back. It was not a message that said, "Oh, isn't this grand that Quebec is brought into the Constitution." It was, "We have some extra powers here, we think, to compromise freedom of expression; and if not, a kind of recognition of the distinctiveness of Quebec's society will make it easier for us politically to use the 'notwithstanding' clause."

**Mr. Cordiano:** I understand that. You brought it to a political level. That is quite different from—

**Mr. Orr:** But it is political; and necessarily it is political.

**Mr. Cordiano:** Yes, but I am looking at what in fact would be the determination of the court looking at these questions and not so much in the political realm. We would like to think that the Supreme Court of Canada will not be—

**Mr. Orr:** But as long as the "notwithstanding" clause hangs up there like a sword of Damocles, I do not care what the Supreme Court decides. If we go through four or five years of public



sentiment saying, "Well, there is a recognition of Quebec's distinctiveness and that means we can protect the French language, etc."; if that is the rhetoric that is used by a government, it is going to get into a court case, there is going to be a decision around a freedom of expression case, maybe in favour of the group that is seeking protection of freedom of expression, and the government is going to turn around and say, "But we are distinct; that has been recognized for four years," and they are going to use the "notwithstanding" clause.

The political price to pay, which was supposedly the justification for Liberal democrats allowing a "notwithstanding" clause to go through in the first place, is going to be very, very substantially reduced by the recognition of the distinct society.

**Mr. Cordiano:** You are referring to section 33 of the charter, which has existed from the beginning; it certainly was exercised by Quebec all the way through.

**Mr. Orr:** It was not a part of these negotiations, although I think it should have been part of these negotiations.

**Mr. Cordiano:** No, it was not. That is a separate issue entirely.

**Mr. Orr:** I do not think it is a separate issue. I do not think you can pick and choose in the Constitution. You can pick and choose as a lawyer, and the judges and the justices can pick and choose, but it all becomes a package; it all becomes a vision of what the country is.

**Mr. Cordiano:** So your view is that we should do away with the "notwithstanding" clause, section 33 of the charter.

**Mr. Orr:** In our brief, clearly we believe it should be done away with. I do not say in this deal, but certainly when you as a government are discussing what your next constitutional gambit is to be, it seems to me that is one of the things we have to address as a country.

1140

**Mr. Williams:** I am not a constitutional lawyer, but there is an alliance report that I have also brought; it is not part of our brief, but I think it is important that I bring it to your attention. I would like you to know in people terms some of the issues that we are living with.

With the Quebec charter, we won unanimously in the Court of Appeal. We won not on integral bilingualism; we won on the obligation of French on all signs and the right to other languages. The government of Quebec is appealing that decision; it is not appealing a decision of institutional

bilingualism but the right to have something other than French. That is the number one we are living; just in terms of why we have doubts here.

The cinema law right now means we will not get certain English films in of Quebec unless they are dubbed in Quebec in French. There is the welfare reform that has recently been tabled; the English-speaking community was basically neglected in that. In December 1986, Bill 142 was passed in the National Assembly guaranteeing English health and social services for the first time; it is similar to Bill 8, but there was quite a battle to get it through.

The Office de la langue française just recently revoked the bilingual status of a municipality; it happened to fall below 50 per cent, and they automatically just revoked it. The bilingual status did not force that town to do anything; it just gave them a right to do things other than in French.

That is the kind of reality we are living. That is the intent. There are certain limitations, as in article 1, but there are things that go beyond that. I suggest there is enough doubt in the new accord to really put in question the intent of some of those ministers on a daily basis.

**Mr. Elliot:** I would like to begin what I have to say by apologizing to the private citizen who is waiting patiently to present. Thank goodness somebody opted out this morning, or we would not have had nearly enough time to talk to you the way we wanted to. I think this is due in part, as somebody said, to yours being the first presentation from Quebec. I think it is also due in part to the best living example we have got right now of how difficult the resolution of this problem is going to be, because in a committee of 10, like we are, I think when you look at the clock and realize you have got about an hour to talk, and a couple of the committee members use up two thirds of that time, it leaves the rest of us with very little time to make the points that we would like to make in our presentations.

I would like to go back to the beginning of your presentation. My question is a little bit futuristic and winds up on the point that you were last making, so it is sort of a supplementary to what you just talked about.

I was pleased at the beginning when you said that you were not coming here to get us to fight your battle in Quebec, because I feel that the future English-speaking minority in Quebec has to resolve its problems within Quebec with the French majority. However, having said that, in the context of the answers that have been given, I think we are in it together very definitely, and

you are looking to us for leadership, at least from the point of view that we have a committee struck to address the Meech Lake accord. Possibly Manitoba may have a committee, and possibly one other province may have a committee. Only one person—that is a Premier—is in a position to actually reject the accord at the present time. This is the reality that we are part of, and I think we are all talking about nation-building here.

What I am finding is this sort of narrow point of view with respect to particular interests. I hope that this narrow point of view with respect to particular interests, because those people argue their points so definitively and so well, will finally be taken in the whole context.

Where we are at in Canada—and I think you alluded to this in your last answer—is that we have got our own Constitution now, we have got our Charter of Rights now, and just recently we got a constitutional accord that we are trying to say yea or nay to. I submit that your comment with respect to taking all of these things into consideration when you are judging one particular aspect of life as we know it in Canada is the most important concept that we have to address here.

The other thing from a committee point of view that is coming through loud and clear, and came through in a lot of your answers, is that just about everybody who comes to us is demanding consultation before the fact as opposed to after the fact. The process by which we came to this accord is flawed; it has got to be changed in some way. I think everybody in Canada is going to demand that kind of consultation. That is really what I want to address my question to.

The other realization we have to keep in mind when we are talking about consultation is that somebody finally has to make a decision. With respect to constitution-building, at the present time it is 10 premiers and a Prime Minister; hopefully, we will be able to negotiate maybe more input than that, but at the present time it is the famous 11 who do it. They have to make a decision, hopefully based on consultation.

My question has to do with the street sign question in Quebec. This is the kind of dramatic thing that people can point to to say that that is really a bad news situation from an Ontario point of view. They can point to Toronto and say that in an area of Toronto we have Greek street signs for various reasons. A lot of it has to do with a lot of recent immigrants who want to be able to read the street signs. In the Chinese community, it might be because it is tourist area. There are a lot of valid reasons for having street signs in languages

other than the one language that is predominant in a particular province.

Because we are talking about this compromise of fundamental freedoms, do you think as an English minority in Quebec that you will be allowed to consult in a meaningful way with the French majority at this point in time?

Suppose this committee is able to propose something long range, because it is nation-building you are not going to do it with a single thing, as my colleague from across the room says; a court challenge and deciding the thing once and for all tends to be the point of view that we have, but it is not going to wash.

You alluded in your comments to the fact that probably the override feature for five years will be employed if Quebec loses the present court case. So we are talking about 1993 on that one challenge alone. A single court challenge is not going to settle this issue. It is farther than that. What is going to settle it is is meaningful dialogue among various groups of people in our country. One of the most significant dialogues has to happen in Quebec between the English-speaking and French-speaking people.

**Mr. Orr:** There is no question that that dialogue has been happening for the last several years. Alliance Québec was set up precisely to try to encourage that dialogue and I think we have been successful in a lot of areas. You are quite right. It is worth my repeating that we are not here to ask for Ontario to intervene directly in some of these questions in Quebec. We are prepared to fight those battles. We are prepared to create those debates and dialogues. We are prepared to do what it takes to make sure our community has a future.

I think you are also right that language issues, in particular, do not stop at any one border. Language issues and the treatment of a minority in any one province become grist for the mill for people who oppose language reform in another province. Just a couple of weeks ago, I was in Ottawa talking with members of Parliament who were opposing the new Official Languages Act supposedly on the basis of the treatment of English-speaking people in Quebec. That is just not legitimate. Obviously, there are problems and we are working on those problems, but to suggest that you are going to improve the situation in Quebec by blocking a piece of legislation that is important for our community is just an absurd kind of thinking.

The fact of the matter is, as I said quite a bit earlier, that in Canada now we have more and more governments taking on their responsibility



for language reform. Ontario clearly has done that. New Brunswick has done that. Manitoba tried and was scared off it, but maybe it will come back and do that. Even in some of the other provinces, we see some tentative steps towards taking responsibility for language reform. It has to be said that in Quebec it is not a black picture. We would not be there if it were completely unacceptable, but there are problems we are dealing with and we are working on them.

More and more governments are taking responsibility for this, and it seems to me more and more governments therefore have the responsibility to give national leadership on these questions. In the Meech Lake accord, clearly we are talking about language matters. That is one of the pre-eminent things. The first characteristic we are talking about is language. For the first ministers to step back at this point and not impose upon themselves—even in an opting-in formula, for example, the way the Fédération des francophones hors Québec has suggested—a constitutional responsibility to promote both official languages is just beyond belief for me.

Sure, there may be some premiers and governments in this country that are not ready to take that kind of step, but there are other governments that are ready to take that step and it is time for them to take that step. It is time for them to say publicly that language matters are not contained in any one province. It is legitimate for the government of Ontario to be concerned about minority-language issues in Quebec, New Brunswick or wherever else, just as the Quebec government has traditionally been concerned about minority-language treatment in other provinces and the situation of francophone groups in other provinces.

**1150**

I agree with you that it is a process of nation-building and I agree with you that court decisions are not the only or the pre-eminent way to go about nation-building. On the other hand, we do from time to time get ourselves into situations where the court option is the only option, especially for minorities within a province, and we have to ensure that in that process of nation-building, in those discussions and in those governments taking on their responsibilities to speak out on these issues, that at the same time the minorities themselves have the tools to make sure that their rights and interests are respected and advanced in whatever jurisdiction.

I agree with you; it is nation-building. I agree with you; it is long term. I agree with you that everybody has to speak out on these things. I also

think we agree that minorities themselves have to be given certain basic tools in terms of charter rights and other protections to guarantee their interests. I also agree with you that we are in it together because we are talking about the Constitution of Canada and we are, after all, all Canadians. It is a national initiative.

**Mr. Chairman:** Thank you very much for spending a good deal of time with us this morning. I think, as Mr. Elliot pointed out, in some ways it has been fortunate that we have had time to explore some of these issues, in particular the whole question of minorities. As has been mentioned, we have heard from the l'Association canadienne-française de l'Ontario. That whole aspect of official language minority groups is one which is obviously very important to us.

I think your observations on the relationship between the distinct society and how those official language minorities can be protected is very important and it is something we have to look at very carefully. We thank you very much for your presentation, for your brief and for coming and being with us this morning.

**Mr. Orr:** Thank you.

**Mr. Chairman:** I now call on John Pepall to come forward to present his brief. I believe we have a copy of your submission, Mr. Pepall, which has been distributed. We all have a copy of that. Let me also apologize that we are running behind, but we will certainly listen carefully to your comments and suggestions. Perhaps you would like to begin with your presentation and we will then follow it up with questions.

JOHN T. PEPALL

**Mr. Pepall:** Thank you, Mr. Chairman. I am happy to be able to appear here any time the committee could hear me. I have enjoyed following the hearings of the committee both live here this morning and on TV. Before dealing with the specific points I raise in my brief, I will make three comments that arise from reflections I have had in following the hearings before you and also one point that puts my submission in context.

You can see from my brief that I am vehemently and comprehensively opposed to the resolution before you. It may seem that the position I take is eccentric and hopeless. On the other hand, in that position I have not the consolation of feeling that I am original, because I think it is fair to say that each of the major points I make in attacking the resolution has been made already by many eminent people and was made

indeed immediately after the terms of the Meech Lake accord became known.

I suggest that it is important that the committee take this into account. There is something wrong with a situation in which we can be here facing what, as many people have reflected, may be a *fait accompli* when, in fact, there are very many serious, widely held objections to it. It is a matter of concern that our political institutions have somehow or another not been able to reflect these concerns and reservations.

This is not like an ordinary bill that may come before you where, I suggest, you simply have to be satisfied yourselves that it is right and for the benefit of the people of the province, and if you should pass it and if experience shows it is not so good, then you can have a second look at it, amend it or repeal it. In constitutional matters, I suggest, you should not be passing anything, even if you think yourselves that it is good, where there are serious objections and these have not been accommodated.

The second preliminary point I want to make is that obviously a great deal of your discussion has covered the point that it is unclear what particularly section 2, the "distinct society" provision, means and what many of the other provisions mean. You have had before you putative experts to tell you what it means. To some degree, what they have said has been contradictory, and to that extent, you may feel unhelpful, simply compounding your confusion. Some of them have attempted to assure you that it is all quite clear what it means, that it does not really mean anything very much or that the courts can work this out along traditional lines. I suggest that any assurances you may have had from law professors or other putative experts on these matters are, unfortunately, worthless.

The language in this accord is unprecedented. It is going to go in a Constitution that is only really five years old. The fashion in constitutional jurisprudence that is promoted in the law schools of this country is to be creative, imaginative, forward-looking and so on. I suggest that it is simply impossible to know where any of this may lead in the long run except to say that it is going to leave fundamental political issues being decided by the courts rather than by the legislatures and Parliament, which I suggest is where they should be decided.

I know there has been some consideration of the possibility of clarifying some of the uncertainties by way of a reference, and I suggest that is not an available option in this case. You can have a reference, as was the case with the

separate schools issue, where you have a specific piece of legislation and you can ask the court, "Is this consistent with the charter or not?" But you cannot really ask the court to say, "How will section 2 affect the charter now and in the decades and centuries to come?" The question is too general, and I do not know whether the courts would hear it. If they would hear it, I am afraid any answer they might give would be of little or no value.

Finally, I think perhaps most of the people who have appeared before you have been representatives of organizations of Indians, women, the handicapped and several ethnic groups. Their general theme has been, "There is nothing in this for us;" that if anything, the fact that there is something in it for Quebec is perhaps an injury to their specific communities or constituencies, and something should be done to reflect their interests in the Constitution at this time. I suggest that however compelling you may feel the concerns of these various organizations are—and no doubt many of them are—the answer to their concerns is not in the Constitution.

The Constitution should not attempt to deal with substantive issues; it should deal with the framework, the institutions and the powers of those institutions. We should not try to burden the Constitution—it is already too much burdened—with formulae, slogans, some kind of friendly language for each community of interest group in the country, however much you may be concerned to assist them. That is your job as legislators in the bills you pass and in your scrutiny of the government's activity. It is not your job as constitution makers. The Constitution should be made from the framework, and to the extent that you add general formulae to try to accommodate the interests of specific interest groups within the community, you are just going to create problems. The results may be very far from what people who ask you put this kind of language into the Constitution expect, and it is just going to add to the burden of the courts in interpreting the already fairly obscure Constitution.

I will turn now to my brief, which I will try to go through quickly. I refer in it to the various provisions by the sections they would be in the Constitution Act if the resolution were passed. I begin with section 2. The language of the proposed section 2 is so general, evasive and unprecedented that we can only speculate what its legal effect may be over the long term. Passed into our fundamental law, it amounts to a blank cheque to the courts to tell Parliament and the



legislatures what they must do and not do beyond the specific language provisions of the Constitution Act about the fundamental characteristics of the country and Quebec's distinct society.

#### 1200

Any effect of section 2 on the charter is only a small part of its importance. The charter itself is so obscure that it would be wrong to worry that section 2 will weaken it. Under section 2, the whole field of relations between French and English Canada, the perennial theme of our history since the 16th century, is made subject to judicial review. Not only the errors but the omissions of Parliament and the legislatures, under whatever theory these matters may be appealed to judges in generations to come, will be subject to their orders.

In informal discourse both recognitions may seem recognizing the obvious, but what is obvious today may not be obvious tomorrow. If English-speaking Quebecers choose to leave or to be assimilated in a largely officially unilingual province, the presence of English-speaking Canadians in Quebec may not longer be a fundamental characteristic of Canada. What are Parliament and the legislatures to do about it? If, as is the case despite *de facto* and *de jure* official bilingualism in Ontario and the other provinces with a significant population of French-speaking Canadians, French-speaking Canadians continue to assimilate, what are Parliament and the legislatures to do about that?

The fundamental characteristic is to be preserved but Quebec's distinctness is to be promoted. Quebec's role in preserving the fundamental characteristic already conflicts with its role in promoting its distinctness. The cross-party consensus in Quebec is in favour of promoting its distinctness and preserving its Frenchness by unilingualism. Unilingualism must tend to reduce the English presence in Quebec and thus detract from this aspect of the fundamental characteristic.

A constitution, particularly one as difficult to amend as Canada's now is and may soon be, is not made for the near term. The evolution of the French- and English-speaking communities in Quebec and the rest of Canada over the medium-term to long-term is unpredictable and judgements on what should be done about it will evolve, if anything, more radically and more unpredictably. Whether the proposed section 2 is to be read as futilely insisting on the preservation of the exact status quo, the exact proportions of English-speaking and French-speaking Canadians across the country, or as only vaguely setting

a direction, it will operate as the subjection of the Parliament and the legislatures to the general and indefinite supervision of the courts in place of the democratic resolution of such issues as may arise.

The legal effect of this section must be to pass power from Parliament and the legislatures to the courts. It assures no specific outcome and may lead to dangerous conflicts between the courts and our democratic institutions. The power to strike down democratically approved laws given to the courts by the charter can be unsatisfactory. Whatever one thinks of the Morgentaler decision, it cannot be satisfactory that it results in a legal vacuum until Parliament passes legislation consistent with it. It is a dangerous extension of the power of the courts to commission them to require Parliament or the legislatures to adopt laws in fulfilment of their roles under section 2. Unless it is entirely meaningless, that is what section 2 does.

Section 25: a bicameral parliament works only where the upper House will only rarely reject or substantially amend measures passed in the lower House. If the devolving of the power to nominate senators to the provincial governments is to amount to anything more than sharing out patronage plums, it will lead to senators attempting to interfere with the national government's legislative program in the political interests of the provincial governments that nominated them. This will weaken the national government, which must be free to act within its jurisdiction under the Constitution Act without provincial interference. It will dangerously increase the possibility of a deadlock between the House of Commons and the Senate. The limited power to overcome a deadlock, by the appointment of extra senators under section 26, will be seriously diluted by provincial leverage through the power of nomination.

The requirement that senators only be appointed from persons whose names have been submitted by the provincial governments will lead to friction and impasses over appointments. In most cases, no doubt, appointments will be worked out to the rough satisfaction of the provincial and national governments. But that cannot always happen as governments with conflicting political wills play a game of chicken, with the provincial government threatening ever-more unacceptable nominees and the national government a prolonged vacancy. Relations between the national and the provincial governments will be poisoned and Senate appointments will become a form of low comedy.

As the courts become more free-spirited in the interpretation of the Constitution Act, encouraged by its open language, they may become dangerously involved in attempts to break impasses over appointments to the Senate.

Sections 95A to E: nothing in the Constitution Act, as it stands, prevents Parliament from passing legislation to accommodate provincial wishes on immigration. The effect of the proposed sections 95A to E is to entrench in the Constitution Act agreements between the national government and a provincial government on immigration. They enable the national government to bind future parliaments indefinitely to an agreement with a provincial government on immigration by simple majority resolutions in the House of Commons and Senate. They will result in a damaging reduction of the basic power and responsibility of the national government. As admission to any province is admission to the whole of Canada, immigration is essentially a national concern in which the national government has always had paramountcy since 1867.

Sections 101A to 101E: the entrenchment of the Supreme Court of Canada will make the organization of final courts of appeal in Canada inflexible and subject to political constitutional negotiation. Already, before the Constitution Act, 1982, the Supreme Court of Canada was severely burdened. Section 101A will make expansion or division of the court, practically speaking, impossible.

The requirement that appointments to the Supreme Court of Canada be made from nominees submitted by the government of Quebec for the three civil law seats or the other provincial governments for the rest implies and is based on the presumption that the judges have represented and will represent the interests of the government that nominates them. This is a fundamental attack on the independence and freedom from bias of the judiciary.

There have never been any grounds for this presumption. The entrenchment of provincial nominations to the Supreme Court of Canada gives constitutional sanction to the theory that its judges should serve the interests of the provincial governments and will damage the authority of the court.

Friction and impasses over appointments, particularly from Quebec, are bound to occur and will acutely damage the court. As with Senate appointments, it is possible that the court will become involved in breaking impasses over appointments, an appalling prospect.

Entrenchment, together with the vastly increased constitutional responsibilities of the court, practically all of whose time will likely be taken up in making final decisions on constitutional cases—

[Interruption]

**Mr. Chairman:** My apologies. We will resume.

**Mr. Breaugh:** Usually, we are the ones who put them to sleep.

**Mr. Chairman:** I do not know whether it was a dream about the Constitution or what.

**Mr. Pepall:** I am happy to have provoked some kind of reaction at least.

**Mr. Chairman:** Please continue.

**Mr. Pepall:** Entrenchment, together with the vastly increased constitutional responsibilities of the court, practically all of whose time will likely be taken up in making final decisions on constitutional cases that have worked their way up to it or been directly referred to it, will result in the separation of the Supreme Court from the whole body of inferior courts, whose work will remain a mix of ordinary cases at law on which they will generally have the last word and constitutional cases on which they will never have the last word. Its position as an almighty political court above the law will both corrupt it—all power corrupts—and injure its authority.

The entrenchment of the Supreme Court of Canada in the Constitution is a particularly pure case of the craven emulation of American constitutional arrangements. As we imitate the United States, we should note that respect for their Supreme Court has been greatly injured in recent years and will likely continue to decline.

Section 106A: it is already objectionable that Parliament is paying for national shared-cost programs in areas of exclusive provincial jurisdiction under the Constitution Act. Where a national program is desirable, the provincial government should give up jurisdiction and let taxing, spending and responsibility rest altogether with the national government. If there are to be such programs, there is nothing to stop the national and some provincial governments agreeing on opting out and consequent financial arrangements.

The proposed section 106A will give the provincial governments an automatic no-cost option of opting out and will require the courts to judge whether a province carries on a program or initiative that is compatible with the national objectives and what reasonable compensation for the opting-out province should be. The involve-



ment of the courts in the detailed assessment of political programs and financial tradeoffs between the levels of government is wholly unacceptable.

I have made several comments in my brief about the wording. I have not bothered to repeat them to you today, but I will in this case. In the proposed section, the use of the political phrase "the government of Canada" is particularly inept. The government of Canada has no money except what Parliament votes it. It is Parliament that will have to provide such reasonable compensation as the courts decide, and this bad provision, if it must pass, should say so.

#### 1210

Section 148: the emergence of so-called first ministers' conferences in the past 25 years as a major feature of national politics has already injured our political culture and institutions. They have confused responsibility, distracted governments at both levels from their work and seriously undermined the authority of the national government in its own jurisdiction. Such meetings, if not banned outright, ought to be rare and informal. To entrench them in the Constitution is grotesque.

The Prime Minister and the provincial premiers are simply *primus inter pares* ministers running committees of ministers responsible to their respective Parliament and legislatures. Their place in the simple but strong and profoundly good constitutional institutions developed in Britain and the Commonwealth in the last 300 years is entirely inconsistent with their appearance as great sovereign princes regularly meeting in solemn conclave to settle the nation's affairs. As has probably happened with the measures before you, this corruption of our political culture and institutions has severely damaged the authority of Parliament and the legislatures by presenting them with what are effectively *fait accompli*.

Section 40: this proposed section will encourage no-cost opting out by provinces from transfers of jurisdiction. Canada needs stronger national government and easy transfer of powers from the inflated provincial jurisdiction to the national government. This provision will make transfers more difficult. Again, the courts are to decide what reasonable compensation would be. This decision will be particularly difficult for the courts. In the case of compensation for national programs opted out of, under the proposed section 106A, some measure of financial compensation will be available in the level of national spending on the program opted out of. With a

transfer of jurisdiction, compensation will depend on what is done with the jurisdiction. The national government may choose to do little, using the jurisdiction to keep the field free of regulation and interventionist spending. The opting-out province may keep the jurisdiction to do just the reverse. The courts will be faced with making impossible and politically charged judgements.

Section 41: The requirement of unanimous agreement on amendment of any aspect of the Constitution puts the country in a constitutional straitjacket. The history of Meech Lake and human politics means that this will lead to bargaining in which already overmighty provincial governments make demands on the national government in exchange for their consent to amendments. With such a prospect, it may be better to regard the Constitution as unamendable.

Section 50: The requirement of annual constitutional conferences will perpetuate the constitutional distractions of the last 20 years of Canadian politics. It should be remembered that the conferences in 1864 that led to Confederation were not of first ministers but of delegates of the respective Legislatures. They met, of course, not to take power for themselves out of the constitutional impasse but to give up power to a new government and to build a nation, not to carve it up. The whole course of the debates leading to Confederation should put to shame those who participated in the squalid proceedings leading to the measures before you and who vainly and arrogantly claim to be new Fathers of Confederation.

The holding of annual constitutional conferences in the face of the near impossibility of amending the Constitution under the formulae in sections 38, 41 and 42 is idiotic. It will invite an endless parade of lobbies to push, not for the democratic redress of their legitimate grievances, but for the further encumbering of the Constitution with vague, inflexible formulae to be interpreted by overburdened, irresponsible and politicized courts.

A word about Quebec: Meech Lake, we are told, was necessary to get Quebec to join the Constitution, or some equally nameless phrase. There was no need to have Quebec join the Constitution. The Constitution Act has full and unchallenged legal effect without the support of a resolution of the National Assembly.

It is all for nothing. Who can suppose that when Quebec nationalism resurges again in 10 or 20 years, as it has done again and again since 1759, we will simply say "Meech Lake," and all

will be well? Who can suppose that when tomorrow's separatists are threatening, they will be daunted by the thought that their demands are subject to the veto of Prince Edward Island?

Quebec can join the Constitution and smile on us because it knows that whenever it calculates that the Confederation or the threat of separation alone are no longer profitable, it can go its own way, while a strong national government, already the strongest in Canada, and all the Constitution acts in both official languages you could pass in a century, if you gave your time to nothing else, will not hold it up a minute.

Finally, the courts: The charter has greatly burdened the courts with difficult and dangerous political decisions. It can be argued that for the sake of fundamental rights and freedoms, whose history is tied in with the development of our law, this is satisfactory. It is another thing entirely to burden the courts purely with the settlement of purely political issues: the supervision of relations between English and French Canada, the possible settlement of disputes over Senate and Supreme Court appointments, the supervision of immigration policy, the assessment of national programs and objectives and compensation for opting out of them. Courts are the wrong institutions for the settlement of such questions. Their involvement in them will politicize them.

The "notwithstanding" provisions of section 33 of the Constitution Act limit the irresponsibility of the courts for the larger part of the charter provisions. These provisions were thought necessary in 1982 to preserve parliamentary sovereignty, which is fundamental to our democratic government. They do not and cannot apply to the dangerous political powers given to the courts by Meech Lake. With amendment of the Constitution near impossible, the irresponsibility of the courts is nearly perfect.

In conclusion, the provincial governments in Canada were established and continued as simple instruments of the public good, easily adapted or put aside as circumstances required. Such was their history up to 1867. One hundred years of constitutional stability and the settling of political interests in the existing governments gave them a false appearance of permanence. The constitutional wrestling of the last 20 years has led to the provincial governments becoming de facto sovereignties. They have consistently sought increased power without regard for the national interest, from the politician's instinct to seek more power wherever he can most easily lay his hand on it.

We can either trust ourselves from sea unto sea to run our public affairs together or we cannot. If we can, our democratically elected national Parliament should be free to govern the whole country without provincial or judicial interference. If we cannot, the answer to our mistrust will not be to tie down and make impotent our national parliament, but to accept that we must, to a degree, separate.

I do not believe Canadians want either outcome, but as our Constitution is remade by bargaining between 10 provincial governments and a solitary national government to speak for the national interest, they will get an impotent national government and, finally, the logical sequel in separation. All the provincial governments have gone into this latest bout of constitution-making looking for greater power at the expense of the national government under the cloud of "national unity" and "bringing in Quebec" rhetoric.

It is a sad but not surprising show of human nature that this should be so. But it need not be so. Each of us, whether in provincial government or private citizens, must judge the provisions of our Constitution by whether they serve the interests of Canada as a whole. Ontario should be pushing for a stronger national government, offering to give up jurisdiction to Parliament and leading other provinces to do the same.

The resolution before you will greatly injure our country. I urge you to reject it. If you do not, the damage done may be irreversible and in the long run fatal.

**Mr. Chairman:** Thank you very much for the submission and what clearly is something you have given a great deal of thought to and argued very forcefully. You raise a number of very broad issues, apart from the specific comments on the different points. One of the things we wrestle with is your use of the terms "Canada as a whole" and "national." It is trying to determine what constitutes the national will, national power or Canada as a whole.

I take it from your submission that at this point in our history what you really are saying is that the provincial role should become a diminished role and that the federal government really should increasingly not only be seen to be, but become, the national government. Would it be fair to say that underpinning a lot of your comments is that thrust?

**Mr. Pepall:** Yes, and I do not think that is a very unusual position, though it is not one that has been reflected in the Meech Lake accord. In addition to that, whatever powers the national



government is going to have, whether they are to be less than they have been or more, it should be able to exercise those powers freely without interference from the provinces. The provinces should not be able to have it both ways; that is to say, having a large exclusive jurisdiction and being able to interfere in the national government.

Suppose you reversed the roles and imagined a situation in which the national government was continually intruding into provincial affairs. If we revived legislative councils, for instance, through the provinces, and said that the national government would appoint the members of those legislative councils, we would all agree that would be absurd. It seems to me that various proposals in the Meech Lake accord are equally absurd.

**Mr. Chairman:** I suppose part of the argument is whether the federal government is appropriately a national government or the national government or whether there is not from 1867 on, whatever John A. Macdonald might have preferred, something about this country whereby it is a federal government and a federal government for a reason, and whether we can make some of those changes, whether they are good or not, and that the provinces have existed because of a lot of other factors that go into making up Canada.

In your definition of the national will, where does the province or that expression come into the equation?

1220

**Mr. Pepall:** I think a kind of confusion has arisen as a result of the history. There is, as I think I suggested towards the end of my brief, one unmistakable national government in Canada with a National Assembly and that is in Quebec. Its vocation, if you can call it that, as the national government of the French-speaking nation in North America is something they insist on. It is in a sense behind their pursuit of the formula of a distinct society and so on.

The presence of that nation and its national government in Canada has made it, let us say, impossible for the government in Ottawa to pretend to be in the same sense a national government. As a result of that, the various provinces to the west of Quebec and the maritime provinces, out of political interests that I suggest have nothing to do with any serious need to serve the interests of any particular region, subnation, community or whatever—It is simply because they are there and the easiest way of advancing the power of the provincial politician is to get

more power for provincial governments. It is easier in many cases historically. Particularly for provincial premiers, it is easier than the transition from provincial to national politics.

The provinces have tended to go along with any demand that Quebec makes and weakened the national government as a result. Whatever accommodations may have to be made for Quebec, I suggest that so far as the rest of Canada is concerned, we need a stronger national government and the only one we can have is in Ottawa. What we are getting out of Meech Lake and what we got to some degree out of the 1982 settlement and the history since 1867 have been a continually weakened national government and provinces that then have to seek money from Ottawa in order to carry on the responsibilities they insist on maintaining and so on and the great confusion of responsibility that has injured our politics.

**Miss Roberts:** What you are indicating then is that the Constitution, as you see it now, has been watered down, was watered down in 1982 and is continuing to be watered down. Is that fair?

**Mr. Pepall:** The strength of the national government, certainly.

**Miss Roberts:** That is right, but also Canada itself.

**Mr. Pepall:** Yes.

**Miss Roberts:** Any step we take, even dealing with the Constitution that was set up in 1867, is a watering down. If we forget about Meech Lake and just deal with 1982, that act and the charter, that watered it down to something that is not acceptable to you either.

**Mr. Pepall:** No. I do not consider 1982 satisfactory, but I think that the injury done in 1982 was small in comparison to what this will do.

**Miss Roberts:** On what basis? Just because it is to recognize Quebec, section 2 basically, or each one is equally as destructive?

**Mr. Pepall:** I think that permitting the provinces to attempt to gain leverage over the national government through Supreme Court appointments and through Senate appointments; by giving them easy ways out under the opting-out provisions so that they can take federal money but not have to live with federal policies except in a vague way as the courts may decide; by the extension of the veto power on constitutional amendments—all of these things mean that the provinces have greater powers and greater leverage over the national government. Each one of them injures the national govern-

ment. I think that each of them in itself is more significant than the injuries that may have been done in 1982.

**Miss Roberts:** Just one last thing. What you are indicating then is that the provincial governments are taking over so much power and the inappropriate thing is writing them in the accord. Although it has been argued by some that they already had that power or they may have already had that power, we should leave them outside of the Constitution and let it evolve the way it has since 1987, using the courts for the purposes of interpreting the various exclusive jurisdictions set out in sections 91 and 92, I think, of the Constitution of 1987.

**Mr. Pepall:** Yes. The only issue that has been dealt with in Meech Lake is Quebec, and I have suggested that, basically, it has been dealt with in a phoney way; it does not actually serve any purpose in accommodating Quebec. It may produce cordial relations between Mr. Mulroney and Mr. Bourassa but it does not go beyond that as far as I can see.

Beyond that, it does not seem to me that Meech Lake really deals with any pressing issues; it is just part of this game of constitution-making which we seem to want to turn into a kind of annual festival. The first ministers cannot keep their hands off the Constitution; they all want to be Fathers of Confederation and, in the course of time, one hopes, Mothers of Confederation.

**Miss Roberts:** We are looking forward to that.

**Mr. Pepall:** Yes.

**Mr. Offer:** On page 2 of your brief, I want to carry on with discussion of the distinct society being one aspect of section 2. I take note that in the first paragraph in the last couple of lines—please correct me if I am reading it wrong—I sense that you are saying that there is, for want of a better word, a hidden agenda by Quebec to promote unilingualism within the province.

**Mr. Pepall:** I do not think it is hidden; I think it is quite expressed. What you heard this morning about—it can seem a trivial matter, but there are other examples—the fines law forbidding the use of English on signs in Quebec is quite obvious. I do not think Quebec is being secret or furtive about it. I do not even say they are wrong. I am just saying that gives some meaning to the idea of the promotion of a distinct society, and it is not one that I think is generally acceptable.

**Mr. Offer:** So this concern of yours about the promotion by Quebec of a unilingual province is

the foundation of your concern with respect to section 2?

**Mr. Pepall:** My concern about the effect of section 2 is basically that it says: "We don't really know what to do about the English and French in Canada. Let the courts decide." That is what it amounts to.

**Mr. Offer:** The question I have is that it could be argued that the "distinct society" clause in section 2, with respect to Quebec, could include a number of factors, a whole ream of factors basically: the French-speaking people within Quebec, the English-speaking people within Quebec, the court systems within Quebec. We have heard some of those factors today.

Now, if it is correct that they may be an element of the distinct society, and moving down in section 2, that Quebec now has an obligation not only to preserve but also to promote, and if one of those things it must do in the preservation and promotion of its "distinct society" character might concern one element being English-speaking persons in Quebec, does it not follow, of necessity, that the mere existence of this clause answers your concern?

**Mr. Pepall:** I guess there is a double-barrelled answer to that. First, I repeat my point that my concern principally is that the matter is left entirely to the courts. I think this is consistent with what Ramsay Cook was saying early on in your hearings that, if there are issues to be dealt with here, there should be specific provisions, not simply a general formula. My principal concern is that it is throwing the whole matter into the hands of the courts.

Second, in regard to your suggestion as to what the courts may make of it and the suggestion that they may make of the distinct society that it includes an English-speaking minority and so on, to the extent that one can speculate on what the courts will do, no, I do not think that is what they will do. Particularly when you have three Quebec nominees in the Supreme Court of Canada, in the last instance the courts will most likely say what this is about is the Frenchness of Quebec. When it comes down to it, we all know that the Frenchness of Quebec is what makes it distinct. That is what it is going to mean. Now, exactly how far they will carry it and what the effect of any judicial decisions may be, as I say, is a matter of speculation.

1230

Let me put it this way. I do not think legislators such as yourselves should sit down and pass things on the basis that you do not really know



what they mean and you are content to leave it to the courts. You really ought not to be here if you cannot make up your minds what sort of country this should be, what sort of laws we should have. It is all very well to have the courts there to second-guess you about rights and freedoms—that is a special area—but beyond that, to say, “We really do not know quite what this means but we will let it go anyway and let the courts figure it out,” seems to me is abdication of responsibility.

**Mr. Allen:** I appreciate Mr. Pepall coming before us essentially, as I hear you, to emphasize for us, first, the propriety of the parliamentary legislative tradition as the central thrust of government in our country and in our tradition and, second, the importance of the political process as an ongoing means of resolving the disputes in the nation as distinct from either overburdening the courts with those matters or leaving it strictly and simply, as appears to be more often the case, to first ministers gathering on terrain that is not entirely described for anybody in any constitutional precedent in the nation.

Can I ask you where you see our present status in all that? I think our dilemma is that we have been brought into being as a committee, on the one hand, genuinely as a part of the Legislature and therefore part of a political process but, more immediately, as sort of an appendage to the sovereign princes whom you referred to, who have taken certain positions and then have said, “Yes, this needs legislative approval.” But then the legislative approval really is only a rubber-stamping and, in effect, when Mr. Bourassa acts as quickly as he did, it totally rigidifies the whole process for the Legislature and makes it impossible to be what a legislature is supposed to be and therefore this committee to be what it ought to be in this process.

Do you see legislative committees like ours having a vital and ongoing role in this whole constitution-making business? If so, how do we get around the kind of arbitrariness that we seem to be struck with on the other side of our activity?

**Mr. Pepall:** Yes, I certainly see you as having a vital role. To put it more simply, I think you should take your role seriously. Of course, I am suggesting you should simply give a resounding no to what is before you, but if you are not persuaded to go the whole way as I suggest, certainly make amendments and push for them. I cannot imagine that you would all have sat here for so long, as you have already, if you did not have some idea that you could do that, however

doubtful you may be as to just exactly where to go.

The simple answer is of course, yes, you should take your responsibility seriously and make your own decisions as to what is right, consider the objections that have been made and propose amendments or reject the resolution as you see fit. Dealing with the question of process and how this was arrived at, I would suggest at a minimum a very simple and I would have thought relatively innocuous change that could be made would be simply to strike out the provisions for first ministers’ conferences. I do not suggest that you forbid the first ministers to meet, but strike them out.

If you take the constitutional process, as long as that provision is in there for annual first ministers’ meetings to discuss the Constitution, the concern that Mr. Breagh and others in this committee have expressed about how they got here and whether it will happen again the next time is alive and threatening. As long as in the Constitution itself the first ministers are there to discuss the Constitution on an annual basis, committees of this Legislature and so on are always going to be trailing on behind, with very little hope of having any effective say on what is done.

So the simplest thing that could be done to improve the process, to deal with that alone and not the substance of what has been decided, is to strike out the first ministers’ meetings. On that score, just strike out the constitutional ones. If they want to get together and have a general talk about the state of the nation, I am not in favour of it but I think it is less threatening than a constitutional conference.

**Mr. Allen:** Would you agree—I suspect you would—that if we are caught in a series of single problem-solving exercises around the Constitution and this goes on and on, we as a committee on the other hand are going to be drawn into a process that could well trivialize not only the process but also the Constitution itself as every issue becomes constitutionalized?

**Mr. Pepall:** Yes, I think there is a serious risk of that. I respect the various organizations, for instance, that have come before you. I think if I were on the board of one of these organizations, I would perhaps say to myself, “I think we should probably go down to the select committee and say there should be something in Meech Lake for us.” That is one of the unhappy effects of all this constitution-making. Everybody immediately thinks that the first way to solve your problems, if you are unhappy with your position in society, is

to get something in the Constitution, and once you have it in the Constitution, then to go to the courts, not just with respect to this resolution but almost anything.

You people might as well take a long vacation. We really might as well forget about elections, because it is all going to be decided by first ministers, by the Constitution and then by the courts. I think we should do anything we can to encourage people to return to normal politics where, if they have a concern, if they think they need more services or they are being discriminated against or whatever, they come before legislatures or the Parliament and say, "Please pass a bill." You consider that in the ordinary way and if it does not work out, you amend it. That is the way to deal with all these issues. As long as we persist in this constitutional obsession, we are never going to get back to that.

**Mr. Chairman:** Thank you very much. I think one of the things your presentation and your comments in answer to questions have underlined is that legislative role: in a parliamentary system, albeit a federal parliamentary system, how we measure off, I suppose, the number of competing or perceived competing goods in

terms of rights and powers, and that one simple process we have where people go into an election and vote. Where do we as legislators, here or in Ottawa or wherever, try to assess that balance so that a lot of the things you are talking about are perhaps more appropriately dealt with at that level?

I think in the light of a lot of the things that have been said so far, it is good that you came and good that you reminded us of some of those things, if I am right. I want to thank you again for putting forward the brief and the way you laid it out, which makes it, I think, quite straightforward to follow. As we have said on a number of occasions, we very much appreciate it that you as a private citizen have come forward. We hope that others watching or observing legislative committees will recognize that private citizens have every bit as much right to come as does any group or government or whatever. We thank you.

**Mr. Pepall:** Thank you very much. I appreciate being here.

The committee recessed at 12:40 p.m.



## AFTERNOON SITTING

The committee resumed at 2:03 p.m. in room 151.

**Mr. Chairman:** Good afternoon. Mr. McLachlan is the interim leader of the Liberal Party in the Yukon. It is a pleasure to welcome you to Queen's Park. We thank you for coming a considerable distance. As you know, the government leader was here the other day as was another colleague, the leader of the Progressive Conservative Party. I think that has helped us greatly in understanding more clearly the concerns from the Yukon.

In addition, we had two members of the government of the Northwest Territories. It is a pleasure to have you here with us this afternoon. We have copies of your submission and if you would like to take us through it, then we will follow up with questions.

JAMES McLACHLAN

**Mr. McLachlan:** Mr. Chairman, and distinguished members of the Ontario Legislature, thank you very much for this opportunity to address the committee on the concerns that the Yukon Liberal Party has on the Meech Lake accord. I must also say that you will find that my party's opinion towards the accord is very similar to the Yukon's other two political parties and, indeed, the views of the vast majority of Yukoners and northerners.

On April 30, 1987, the first ministers met at Meech Lake, Quebec, to draw up constitutional changes which would bring about Quebec's full membership in Canada's Constitution. The result was a document which we all know as the Meech Lake accord. Among other things, the accord will require the unanimous consent of the existing provinces for the admission of new provinces. This amendment would make the Yukon's chances of one day achieving provincial status almost impossible, and certainly very, very difficult. The accord also gives every province in Canada the power to put names forward for appointment to Canada's Senate and the Supreme Court of Canada. The Yukon and Northwest Territories have no similar right to put names forward under the accord. In short, the proposed constitutional changes that are referred to as the Meech Lake accord are, indeed, unfair to all northerners. Yukoners, and indeed all northerners, have become second-class citizens when it comes to our Constitution.

Residents of the Yukon and Northwest Territories fully support, I might add, the principle achieved in the accord, which was the bringing of Quebec back into the Canadian constitutional family. However, we feel that the process of constitutional negotiations leading up to the signing of the accord was very seriously flawed, in that territories were not consulted and as a result of the flawed process, the substantive provisions in the accord do not take into consideration either the rights or aspirations of those Canadians living in the Yukon and NWT. I would even go so far as to say that certain provisions in the agreement trample on our rights and make a mockery of our aspiration to one day achieve provincial status.

During the 1982 patriation of Canada's Constitution, the then Prime Minister Pierre Trudeau likened the patriation to a situation where a growing child, who had lived away from his childhood home for a good many years, was returning home one last time. To signify that this was the final break with his parents, and thus his childhood home, all the individual's remaining personal belongings were being removed. These belongings had been left for all those years in the parent's home—England—as a type of security blanket. As long as the grown child left a few of his belongings in his childhood home, the option of one day returning to the protection of the family home was left open. The patriation of our Constitution was likened to that final return home when every belonging is taken from the closet, packed in a suitcase and taken away to a new home, never to return. The process of growing up and becoming a truly independent adult was only then complete for Canada.

If I may, I would like to borrow that descriptive analogy and apply it to what is being done here to northerners, and I hope it will help you understand the frustrations that we are feeling over the accord.

Imagine, if you will, a great and caring home—Canada—where only two of the 12 children still live at home with their parents. These two remaining children—adolescents, if you will—are just beginning to dream of where they will go and what they will do after they leave the protection of the parents' home. The two children are just beginning to imagine a life without the guidance of their parents. Late one night while the two children sleep, the parents convene a meeting with all the older children—the

other 10 provinces. When the two children wake up the next morning, they find they have been locked in their rooms. When the children protest in a mature manner that they have been treated unfairly and that the parents' actions run contrary to all principles of fairness and justice, the parents simply state: "That is tough. An agreement has been reached between us and the 10 older children and we would not dare attempt to change it for fear of upsetting the older children and losing their support in the agreement." When the two children protest that the agreement was reached without their being told, silence is all that is returned to them for an answer.

#### 1410

The bitter memory of how these two young adults, the two territories, were treated during this critical period in their development will scar the relationship the children have with their parents for a long time. The territories' sense of being mistreated and the bitterness which is its result will not soon be forgotten.

Let there be no doubt the children will continue to grow and develop. Of that there can be no doubt. The question is will we do it with the co-operation and support of the federal government or will we just take and do what we want and say, "To hell with maintaining a good relationship with the federal government"?

We in the Yukon Liberal Party hold the federal government responsible for the grave injustice that has been perpetrated on the north. The federal government not only failed to represent the interests of the northern territories at Meech Lake, but in fact sat by and watched while our democratic interests were trampled upon. It seems to us in the north that the federal government has forgotten that Canada is not only made up of 10 provinces, but it does also have two northern territories.

Mr. Mulroney, when first elected Prime Minister, did promise to usher in a period of consultation, co-operation and harmony when it came to federal-provincial relations. Of that we have heard many times. To a certain extent this has been achieved; it is no mean feat to bring about unanimous consent of the 10 provincial premiers for a set of constitutional changes as important and far-reaching as those contained in the accord.

The Yukon Liberal Party, although we strongly disagree with certain provisions of the accord itself, does applaud Mr. Mulroney's achievements in this regard. But the fact remains that the north was not invited to attend the Meech Lake meeting, nor was it consulted about the constitu-

tional changes, even though some of them directly affected the two territories.

Furthermore, the federal government has been obstructionist and has refused to co-operate with the territories since the accord was made public. Mr. Mulroney has not ushered in a period of consultation, co-operation and harmony. His government has not consulted or co-operated with the north in this matter and the result is disharmony.

Any democratic state that does consider itself a fair and just nation must ultimately be judged by how it treats its less powerful minorities. I dare say that if the Meech Lake accord is taken as an example, Canada comes out looking poorly because a small minority of Canadians, those of us who call ourselves northerners, have been done an injustice by this accord.

The accord contains three provisions that we find repulsive: the constitutional amending formula and the clauses having to do with appointments to the Senate and the Supreme Court.

The amending formula contained in the accord would, among other things, require the unanimous consent of Parliament and all 10 provincial legislatures for the creation of new provinces. This proposed formula represents a marked change from the existing formula. Enacted by the Constitution Act of 1982, this requires the consent of Parliament and seven provincial legislatures, representing 50 per cent of the population. The procedure prior to 1982, established by the Constitution Act of 1871, allowed the federal Parliament, acting alone, to create new provinces out of federal territories.

The Yukon Liberal Party believes that the unanimity requirement is so rigid and unworkable that it will make it virtually impossible for the territories to become provinces some day.

Having said this, I would also like to admit that I do understand totally why the existing provinces demanded a veto over the creation of new provinces. In all fairness, existing provinces are fully justified in demanding unanimity over certain matters involving a territorial transition to full provincial status.

It is a matter of fact that the creation of new provinces will affect the numerical operation of the existing constitutional amending formula. As well, the creation of new provinces will affect the fiscal relations among governments. In these exclusive matters, existing provinces are fully justified in demanding unanimous consent before a new province is created.

However, there is an important distinction to be drawn between those aspects of provincehood



that will impact upon existing provinces and those that will not. With the exception of those just mentioned, most aspects of provincehood will in no way affect the other provinces. The legislative and executive powers a new province is to exercise, for example, should be of no concern to the other 10 provinces. Why should the other 10 get involved in the game? In relation to most matters of attaining provincehood, existing provinces have no legitimate claim to a veto.

In its report on the Meech Lake accord, the special joint committee of the House of Commons and the Senate recognized the important distinction I have just alluded to. The report stated that the principle of the equality of all provinces upon which the unanimity requirement in the Meech Lake accord is based "...can be carried too far if it imposes artificial and unnecessary constraints on the natural development of an important part of the country and disadvantages the people who live there."

It is the Yukon Liberal Party's contention that the unanimity clause in the Meech Lake accord does precisely this. The constitutional amending formula contained in the accord places an unnecessary and overpowering constraint on the political development of the territory.

The second and third provisions of the accord, which Yukoners find most unacceptable, are those which have to do with appointments to the Senate and the Supreme Court of this country. The accord requires that future appointments to the Senate and Supreme Court of Canada be made by the federal government from lists of candidates proposed by the provinces. In the case of the territorial Senate vacancies, it appears that these may still be filled by the Prime Minister with little or no consultation with the territory involved. There is no corresponding requirement that the Prime Minister choose from a list of candidates provided by the territory.

In the case of future appointments to the Supreme Court of Canada, the Prime Minister may only make an appointment to the court from lists provided by the provinces. Although qualified northerners could in theory be proposed by a southern province, it is extremely unlikely that this would happen. Provinces are very unlikely to nominate someone from outside their borders. That is a fact of life. It just does not happen.

For all intents and purposes, the Meech Lake accord is then barring Yukoners from eventually becoming a Supreme Court justice. No matter how hard-working, intelligent or ambitious you may be, if you are born on the banks of the Yukon

River, you will never dream of one day, at least from our legal fraternity, becoming a Supreme Court justice.

The Yukon Liberal Party believes that the accord's provisions concerning future appointments to the court and Senate are discriminatory and unjust. Northerners believe that the territorial governments should receive equal treatment and that their duly elected governments should have the authority to recommend qualified northerners for appointment to Canada's Supreme Court and Senate. We just got the Senate seat in 1975. It has only been a very short term for us and we definitely do not want to lose it.

Mr. Chairman, by now you and your fellow committee members must be all thinking to yourselves that, yes, the Yukon has a legitimate grievance over the Meech Lake accord, that they have been done, in some cases, an injustice. We all know that the Prime Minister and the 10 provincial premiers have said they will entertain no attempts to change the document for fear of unravelling it. As a fellow legislator, I know the pressure you are under to come forward with a report that will rock no boats. I understand this position which you find yourselves in.

But the question I must face is this: is the Yukon's battle against the unjust provisions in the Meech Lake accord over? I must tell you that I believe it is not over. There are at least three areas of hope still left for Yukoners. The first is a Senate task force on the Meech Lake constitutional accord and on the Yukon and Northwest Territories. The second is the Yukon court case against the accord which has recently been appealed to the Supreme Court of Canada. Finally, the third avenue of hope is this committee and what you will ask the Ontario Legislature to do with the accord.

The Yukon's first avenue of hope, the Senate task force, which travelled throughout the north and heard northerners' views on the accord, will be submitting its final report and recommendations next week. Yukoners look forward to it. All indications are that the Senate will go so far as to recommend changes to the accord, changes that will alleviate northerners' concerns over the accord, changes that will restore northerners' rights and sense of justice, changes that will restore our faith in the political process of this country.

The Senate came north to hear our voice. They were moved by it, by its anger, by its sense of alienation, but mostly they were moved by the simple fact that if our collective dream of one day achieving provincehood is snuffed out—and the

Meech Lake accord as it is presently written will surely do this—Yukoners will lose all sense of political meaning in life. All indications are that the Senate of Canada has decided to take the bold step necessary to restore that lost sense of meaning.

#### 1420

Our second area of hope lies with the Meech Lake court case. As I have pointed out, the court case has been appealed to the country's highest court. Ladies and gentlemen, I must tell you in all earnestness that I feel that the court case is going to be the bomb that does blow Meech Lake out of the political waters. The following are my reasons, and I would like to point out to you a section of the Constitution Act of 1982, subsection 37.1(3), stating: "The Prime Minister of Canada shall invite elected representatives"—and that is a very firm "shall," not "may"—"of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of a conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories."

This is a clear-cut statement. I could not imagine it being any clearer. It is in the 1982 Constitution Act, passed by the Parliament of Canada. It does create a commitment on the Prime Minister not to do anything without consulting the Yukon and NWT, and I do not believe there is any evidence at all that there was any consultation of the Yukon or the Northwest Territories.

I think that when that section gets before the Supreme Court, it may do the same damage to the Meech Lake accord that the court case in 1982 did to the original Constitution Act of 1982: in other words, they went back to the drawing board and renegotiated. I hope that is what that section will do when it reaches the Supreme Court of Canada.

Mr. Chairman, this brings me to the Yukon's third avenue of hope in our struggle to restore a sense of justice in the north. That avenue is this committee and the Ontario Legislature. I have stated earlier that I understand your position and I understand that you cannot recommend radical changes to the accord. But I hope, and I sincerely hope, that you will recommend changes to those provisions of the accord which do an injustice to the north, as the Senate is expected to do next week. However, I will understand if you find it impossible to make such a sweeping recommendation.

On behalf of my party, on behalf of all Yukoners, as a Liberal I ask that this committee recognize that northerners' rights have been infringed upon by the accord. I hope that a clear and concise statement of that nature will be present in your final report to the Ontario Legislature.

In addition, and more important, I would ask that you recommend that the Ontario Legislature postpone its ratification of the accord until after the Supreme Court of Canada has had the opportunity to decide on the Yukon's court case. It is not very often that a politician can say that he is on the side of right and that time will vindicate his position. This is one of those rare instances. I believe Yukoners and their politicians are on the side of what is right and just. What we need from you is time.

We ask you to postpone your ratification of the accord so that northerners may have the time to have their voice heard in the Supreme Court of Canada and across this country. I have no doubt that when that voice is heard, Canadians from coast to coast will be motivated to restore the political rights which the Meech Lake accord has taken away from northerners.

Thank you for your time.

**Mr. Chairman:** Thank you very much, Mr. McLachlan, for the statement and for your suggestions. I think now with this statement, coupled with the two that we have heard from the Yukon, if we fail to identify the problems as seen from the Yukon, it is not because there was not a concerted effort by Yukoners to make it clear to us. I think your submission today does serve to underline a strong community of interest among all three of the parties, but with some interesting nuances, perhaps, in terms of the route we might go.

With that, I will begin questioning with Mr. Offer.

**Mr. Offer:** I would like to echo the words of the chairman in thanking you for your presentation today.

What I would like to do is pose some questions with respect to your concerns over the amending formula. You have spoken about the amending formula and you have used the words "rigid" and "unworkable." Please forgive me, but I do not see what you are proposing. I mean, you say that the current provision with respect to the unanimity formula is rigid and unworkable. You then go on to say that you understand and admit two areas where existing provinces have some concerns in dealing with the creation of new provinces. But there is that third point which I am posing to you,



and saying that I do not see your suggestion with respect to that.

**Mr. McLachlan:** All right, I will try to alleviate some of your concerns. No one is really proposing that the Yukon is ready for provincehood tomorrow, next week or the following month, or perhaps the following year either. We simply want a chance to have the doors left open some day when the resource revenues are sufficient to maintain us and we perhaps do not need such a large transfer payment from Ottawa, which is probably in the neighbourhood of \$167 million now. It is not a large amount for a province like this; it certainly is for us.

We understand that if you were to have a province of the Yukon and a province of the Northwest Territories in the future, at least as far as the present financial structural arrangements between Ottawa and the territories, and Ottawa and the other provinces are concerned, it would upset the applecart somewhat in that the money that would have to come from the central warehouse would be substantial on a per capita basis. In that regard, we can understand why the provinces are concerned and upset. It would be seen to be taking more than perhaps would be designated as our fair share.

I believe, at least we believe in the party, that the entire process of funding would have to go back for renegotiation when you consider the other two eventually becoming provinces. Myself, I represent a very large mining district at Faro in the Yukon, the largest perhaps, or depending on whether you are from Timmins the second-largest, lead-zinc open pit mining area in the territory, in Canada.

Yukon receives no resource revenue sharing whatsoever from that. Mineral royalties all go to Ottawa; nothing stays in the territory. When you have lived and worked there as long as I have, which is now almost 20 years, sometimes that rubs home a little bit the wrong way.

On the amending formula, the seven out of 10 was rigid as it was. The present structure makes it harder. There was a time when this province was not a province, and nobody I can remember was standing in the way or putting special conditions on Ontario's becoming a province.

Similarly, when the provinces of Alberta and Saskatchewan were formed in 1905, they were carved out of what was then the Northwest Territories, with no special conditions or roadblocks in the way. I guess, Mr. Offer, I am saying that we see your concerns to some extent, but when it comes to establishing an amending formula, we believe that you should have

jurisdiction or have something to say in two areas only, the financial and the amending formula.

When it comes to things which we think are ridiculous, like the Supreme Court appointments or the Senate, we do not see the federal position that they should be submitted only from a list proposed by the 10 premiers, which may or may not be the closest province to us. It may be Mr. Vander Zalm's list. It may be Don Getty's list. But why? It is entirely unnecessary to do it that way, and we feel bitterly abused by those provisions of the accord.

**Mr. Offer:** In supplementary, I see what you are saying with respect to where provinces generally have some concern or some interest with respect to the creation of a province. Putting that fiscal issue aside, can you tell me what your proposal is with respect to the creation of new provinces. What would the formula be? Would it be the 7-50? Would it be at the behest of the federal government? I am just not certain as to what your position is outside of the issue of fiscal concern.

1430

**Mr. McLachlan:** I am proposing, Mr. Offer, that the 1982 Constitution Act be followed the way it was laid out and passed by the parliaments of Canada: that the Yukon and Northwest Territories be consulted on the process and that we be allowed some input into the mechanism that is used to develop that.

I do not know at this point, in these five minutes, what it should be, and I do not know the precise formula that it should follow. All I am saying is that we want a chance to be consulted, we want a chance to be heard and we want representation at that table. What happened in Meech Lake in April and June is reminiscent of a King Arthur and the knights of the Round Table syndrome: "Does everybody agree? Yes? No?" Behind closed doors. We do not like government by that process, where 11 people can shape the direction of this country and the way it is going to carry on.

I have indicated, and you have heard it from the other parties in the territory, that we just do not think that is right, we just do not think that is the proper way to do it and we got a raw deal out of it.

**Mr. Offer:** Do not misunderstand me. I am just trying to find out exactly what the position is outside of that fiscal concern with respect to the creation of provinces.

To carry on, if one accepted that, we go forward and there is some formula with respect to the creation of a province which does not include

the fiscal impact on other provinces. You still need unanimity for that.

What if there is not that unanimity? The question I have is, and I am sure you have probably thought of this, what type of structure or what type of body do you have if the fiscal considerations have been left out of the creation of a province? How do you draw budgets? How do you get into cost-sharing programs? How do you, in truth, in reality, in practice, carry on as a province without that concern being met?

**Mr. McLachlan:** Certainly, Mr. Offer, I take your point well. You can have all the structured powers in the world you believe you have, but without some dollars to make you go along it just does not work.

Let me refer you to the situation—perhaps 1949 is the most recent that I can remember—when Newfoundland entered Confederation. It has been known before that provinces have entered Confederation in this country with special conditions. There is no doubt that, with the 25,000 people we have in the territory and the 60,000 to 70,000 the Northwest Territories have, it is going to have to be some sort of special condition. Again, it is going to have to go down to the negotiating table.

Yes, no territory becoming a province would want to do so. The minute you became a province and raised the flag, you would sink because you had no money to go along with it. We just firmly believe it is going to be a negotiation process. We would like that chance to negotiate, and it did not happen.

**Mr. Offer:** Thank you.

**Mr. Breugh:** I have a couple of quick questions, since we have had a number of delegations from the north who have been kind enough to come and share their concerns with us. You indicate in your presentation that you anticipate that the Senate committee will report within a week or so. Is that fairly solid?

**Mr. McLachlan:** Yes. I have a Vancouver Sun article which I can leave with the clerk of the committee for photocopy and presentation. I believe the date is March 2. Somewhere during your hearings, I believe in your meeting next week, the report of that committee will be out, barring any interruptions with translation into French and English. It may be something, I hope, that will give some weighty consideration to this committee when that—

**Mr. Breugh:** At any rate, it is obvious that we will have the benefit of whatever they report.

Could you give us a little update on the status of your court case? Do you have any indication of when that might be heard?

**Mr. McLachlan:** The decision was made, as Mr. Penikett announced to you last week, to make the go-ahead. I believe it is a concerted effort between the Northwest Territories and the Yukon, pooling financial and legal resources. The preparation of that paperwork that was to accompany the submissions and the reasons is now in production, is now in the process of being drafted. I believe it is scheduled to go some time next month to the Supreme Court.

What I am completely unaware of, of course, is the waiting list. I am not sure what is ahead of it; there always seems to be lots, and I am not sure what the process is. I believe it is as much as 180 days for them even to consider whether they will hear. But considering the expediency of the situation and the impact that this is having on the constitutional development of the country, I believe, at least as far as our lawyers are concerned, it is being drawn up with all possible haste, and I can only hope the same amount of haste is used, Mr. Breugh, in Ottawa when it is under consideration.

**Mr. Breugh:** Basically what I am trying to get a handle on is that the one thing this committee has to assist us a little bit is that, first, we have the value of some hindsight in the sense that we did not go into hearings immediately after the accord was struck, and so we are able to hear, for example, briefs from citizens' groups who have had now almost a year to get a position paper together, examine the accord, look at the ramifications, seek legal advice and to do a number of things, for example, that the joint committee was rather precluded from doing by nature of the fact that its hearings happened very early on.

The second advantage we have, I think it is true to say, is that we are not under any real pressure to report and finalize early. We do have an opportunity to deliberate at some length; and the ratification vote is not required, there is no immediacy to that, either. So we may be able to do something to accommodate some of your concerns.

I guess in this instance it all depends on how the Supreme Court decides to deal with the case you have. It would be nice if this could be finalized within the given date, all the court cases heard and all the recommendations taken, but I do not know whether that is possible. I would rather hope it would be.



But you should know that at least I do not feel that the committee is under the gun to report next week or the following week. I mean, there may be interim reports to the assembly and things of that nature, but there does not seem to be any urgency to finalize a ratification vote, as some other provinces have felt the need to do. Ontario at least has taken the position that we want a committee to go through our normal committee process, frankly, and that is to have a series of public hearings and consider the accord as it is, almost as we would go through a major piece of legislation on a clause-by-clause basis. We will do that. I would think that the committee would want to try to accommodate anybody in terms of waiting until a Senate committee reports; or if it is possible to wait until your court case is heard, I think we would like to do that and we would appreciate in the foreseeable future, as you get more information on when your case might be heard, if you could in some way make us aware of that. That would do it.

Let me just give you one final question. As I go over the concerns you have voiced in here, I do not sense that there is a lot of urgency. I mean, you are not really worried that you are going to have a Senate vacancy filled next year. As I recall in previous testimony, your appointment to the Senate was a person who is rather youthful and you are not anticipating that he will have to resign.

Is there any other kind of urgency in the next six months or year, for example? I am trying to work out a little bit of a time frame here that we might consider.

**Mr. McLachlan:** Certainly the Senate appointment, as I said, was made in 1970, and I believe the individual has not yet reached the age of 60; so that is true, there is no urgency there. Certainly we are not, as I have stated, about to become a province next week, next month or next year.

What it hinges upon—frankly, I agree with you—is the progress being made in the court case. As I understand it, this Legislature has three years from June 2, 1987, of which we have used up some eight months now. I share your views entirely in that I feel that the three provinces I can remember—Quebec, Saskatchewan and Alberta—that have passed the accord have done so on fairly short shrift. In the case of Alberta, I believe, it had a total of two weeks' debate, a total of two weeks, period, in a fall sitting in which the Meech Lake accord was passed.

In retrospect I feel that those three—Quebec perhaps being the exception because it stood to

benefit—did not have the advantage of listening to some of the arguments and at least taking them back for another thought. I am sorry that has happened. It is a fact of life, perhaps, and we applaud the work that is being done by the Ontario Legislature. There are no pressing time constraints except for our preparation of the documentation for the court case.

**1440**

**Mr. Breagh:** From our point of view, to be as fair as I can with you, we are concerned that our members here will want to have a substantive debate on the matter, so we have to give them reasonable notice and provide them with information. We want to accommodate as many individuals, groups, territories and provinces as we can in our consideration, so we are not anxious that these hearings, for example, be speeded up. We are not making decisions on when the committee would report or whether there would be one report or several, but we are interested in time frames and when things might happen.

Just to conclude a little bit, I think everybody in the room gives you the basic point that it was impolite, if not illegal, for the 11 people to sit in a room and exclude representatives from the territories and the Yukon. We have always had some difficulty in sorting out the role of the Yukon and the territories, and accommodations were made, I guess that is the best way to put it.

What many of us are having some difficulty with is, are we dealing with a practical problem that will not emerge for 20 years, or are we dealing with an immediate problem that may not emerge for two or three years but that is in the foreseeable future? How far away do you think the territories and the Yukon really are from some change in their current status? I am not saying you would have to opt for provincial status or whatever.

**Mr. McLachlan:** There is a process of devolution of federal responsibilities to the territory on a continual, ongoing basis. In April 1987, the Northwest Territories took over responsibility for its forestry. We do not have that yet. We do not have the responsibility for mining; it is all federal.

There is a move by the federal government to reduce its presence in the territory. On those matters in which government is involved, it is expected it will transfer powers literally from year to year. In fact, the process has reached the point now where the government of Yukon has created an office of devolution, a devolution commissioner who does nothing but oversee the

transfer of these powers on an ongoing basis. We now have the full responsibility for generation of our own power, as you have with Ontario Hydro. As to provincehood, it could easily be 20 years, no question, with more and more gradual responsibility yearly from federal governments.

**Mr. Breagh:** I think our job would be made so much easier if we were not looking at an agreement which substantially changes the rules of the game, if we were looking at keeping in place the previous formula for adding provinces or something like that, so that you could say we have not changed that rule, there are other circumstances we have to deal with. The catch-22 we are caught in is that acceptance of the accord in its whole form precludes some things we are used to doing, so the rules change a lot.

I suppose it could be argued that if we can accommodate a number of concerns by the time this accord has to be ratified, in other words if we can resolve outstanding problems, maybe we could proceed to ratify. The real difficulty is, what does one do with two territories that will not be ready for provincial status for a fairly lengthy period of time? I think that is a perplexing problem for us because the indications we have had before this committee are that no one knows when that application might come forward or whether there would be some status sought other than provincial status. We are a little hung up on that problem.

**Mr. McLachlan:** What do you do? I guess I would answer you by saying that you leave the door open. Why close it? Why deny that opportunity of some day becoming a province? It was not done so in 1905 for Saskatchewan and Alberta. Why do it now for the territories? What is the reason for that? Why should we not have a fair chance the same as all the other 10 have had? They were all small too. There was a time when Alberta did not have a lot of resource revenue either, which is quite different from the situation you see now.

**Mr. Chairman:** Mrs. Fawcett.

**Mrs. Fawcett:** Thank you very much. I had the good fortune to be in the Yukon during the summer and, addressing Meech Lake, it would come up as an offhand comment: "Well, not to fear. We will become the 51st state."

**Mr. Chairman:** I am sorry. Could you speak a little louder.

**Mrs. Fawcett:** This offhand comment, "Well, we will become the 51st state," I hope it was offhand. Could I have your feelings on that. I

posed that to Mr. Penikett when he was here. He certainly alluded that definitely the feelings were there. Are you of that same opinion?

**Mr. McLachlan:** I know Mr. Penikett has referred to that. I have heard that. I was somewhat disconcerted with it because I am sure there are a number of Yukoners who have no more intention of becoming subject to military conscription than they have of flying to the moon. I believe that is Mr. Penikett's—I hope it is an offhand statement. In fact, it may be used in this game as a bargaining chip—

**Mrs. Fawcett:** That is not very good either.

**Mr. McLachlan:** —just simply saying, "If you do not, we will do this."

I can remember the arguments in talking about free trade between Yukon and Alaska, because we are much closer than the state of Washington, for example. The analogy being used was that at one time the state of Hawaii was trading with the United States on a sugar pact. Eventually it got absorbed and became another state when the advantages of becoming a state became more apparent to it. I cannot see that same type of advantage for Yukon whatsoever.

**Mrs. Fawcett:** It worried me slightly when you were talking about the federal powers being gradually turned over to you. I would not want to see that pursued too far with Alaska right there. Mr. Penikett alluded to the fact that some of the tourism promotion and that kind of thing is done jointly. Is there much of this that goes on that you do jointly?

**Mr. McLachlan:** It is done jointly with Alaska simply because the proximity of the port of Skagway allows us to bring large tour ships in, and then we are only two hours from the capital city of Whitehorse by all-weather, all-year-round road. That probably is the largest consideration there. Then passage is up the inside channel from Vancouver/Seattle to Alaska, and then to the Yukon where we are piggybacking, to some extent, on some of their tourism money. It has worked to our success, but as far as becoming another state is concerned, no. Mr. Penikett used it. I have only heard it briefly. It is not one of my aspirations.

**Mrs. Fawcett:** Good. Thank you. Glad to hear that.

**Mr. Chairman:** The position Mr. Phelps put forward the other day included what I think was quite similar to your remarks, the clause that related to financial arrangements in terms of where other provinces had interests. That seemed to be a common theme in moving forward. Were



the views you presented to us today also presented to the Senate committee when it was in the Yukon? Did your party make a presentation?

**Mr. McLachlan:** Yes, a lot of this—certainly the part about asking this committee to wait until the court case completed was not included, because that is addressed specifically to this committee. When the Senate committee met in Whitehorse on October 24 and 25, of course the decision was not made at that point to go to Meech Lake. In fact we only got, I believe two days before Christmas, the decision of the British Columbia Court of Appeal. It was December 23: 60 days from then was yesterday to make the appeal to the Supreme Court. Mr. Penikett finalized that decision by last week. But yes, most of the ideas in here, except for this one about waiting were included.

**Mr. Chairman:** The other thing I would like to ask you is with respect to native questions and the issue in the Yukon. To what extent do you think some of the things we see in the Meech Lake accord relate to concerns the federal government has, and perhaps some of the provinces have, as to what may eventually develop in the Yukon and the territories in terms of the land settlements and/or relative power relationships there. I guess part of our problem at times is that as we listen to what seems to be a very plausible and sensible argument about where you are headed constitutionally and about wanting to leave the door open, we are searching for the reasons it ended up the way it ended up. In your view, are there perhaps some hidden agendas or other issues or problems which are not being discussed directly but are reflected in what has emerged through the Meech Lake-Langevin agreement?

1450

**Mr. McLachlan:** The Meech Lake accord certainly is going to throw some additional monkey wrenches or spanners into the whole process of trying to negotiate a constitutional land claims settlement in the Yukon, which has been going on since Mr. Chrétien was Minister of Indian Affairs and Northern Development in 1974. In 1988, it is still going on and is still trying to be settled.

The unanimity clause is a very serious one when it comes to land claims negotiations. It leaves open the door, at least leaves open the situation with question marks, as to what that effect is going to be when it comes to settlement of the land claims. There are three parties to that agreement: the Yukon, the CYI or Council for Yukon Indians and the federal government of

Canada. We feel it is something that is going to make just one more difficult step in the game of getting a land claims settlement.

**Mr. Chairman:** What is your view of where we are at in terms of a land claims settlement in the Yukon?

**Mr. McLachlan:** I would like to think in the next 18 months, but that provision has been put forward before too, and something inevitably comes up to throw a monkey wrench into it. I know it is certainly big on the present government's agenda. Talks are going on again. If an overall settlement cannot be reached immediately by this, the process is to do it band by band.

**Mr. Chairman:** Yes, 12.

**Mr. McLachlan:** Yes, 12 separate bands.

**Mr. Chairman:** If that is an issue that is somehow skirting around behind all of this—it is not being openly put to you or to the other leaders in the Yukon, "We had to do some of these things because we have concerns about other issues there that do not necessarily fit in here."

**Mr. McLachlan:** The federal government has never said directly, "We did this because of some of the other issues, i.e., land claims." It is a difficult process as it is. As I said, people feel it could make it worse.

**Mr. Chairman:** Mr. McLachlan, I want to thank you very much for coming and joining us today. As I said earlier, as we put your testimony together with that of your colleagues I think we will have received a good indication of not only the concerns from the Yukon but also the feeling that comes from that in terms of how the whole process works. We will certainly look at that very carefully. We thank you very much for joining us today.

Our next witness is Peter Meekison from the University of Alberta. Mr. Meekison is delayed, so I will suggest that we take a short recess. As soon as he arrives, we will begin.

The committee recessed at 2:54 p.m.

1518

**Mr. Chairman:** Please come to the table. We thank you for coming in. We had a lost witness so we are happy you are here early and we can get started.

**Ms. Coyne:** It is either that or watch the Olympics.

**Mr. Chairman:** That is right. What I will do is simply bring the microphone over to you and if you would like to make your opening remarks, we will follow up with a period of questions.

## DEBORAH COYNE

**Ms. Coyne:** Thank you very much. I will start out with an opening statement and then obviously I will be open to all questions for you to clarify something or ask me anything you might wish.

I want to start out with a question. What is the debate over the Meech Lake accord really all about? It is about a few things. It is about challenge, the challenge of articulating a vision of Canada as a bilingual and multicultural nation, the challenge of accommodating our diversity and building a fairer, more compassionate society. It is also about courage and commitment, the courage and commitment to pursue the national interest and an idea of Canada that is more than simply the sum of its parts. Above all, it is about leadership. It is about principled leaders who have the courage and commitment to meet the challenge of nation-building.

The trouble with Meech Lake, like the bilateral trade deal, is that it reflects a void of national leadership. Sure, it is much easier to make a deal just by giving everything away to all the provinces. Sure, it is much easier to appeal to everyone's selfish me-first instincts by concluding a deeply flawed trade deal on the basis that it is going to add a couple of percentage points to our gross national product and perhaps a few more jobs. That is not leadership.

Leadership can be tough. It means rising above the pressures of single-interest groups and pursuing the broader national interest. It means making tough choices and having the courage to stick to your convictions and principles. Most important, leadership involves appealing to and drawing out of us our more noble instincts, like our commitment to sharing and to compassion for the less fortunate and to greater social justice.

Clearly, our national leaders have not measured up to this standard, particularly when it comes to changing our basic law. Yet the midwives of the Meech Lake accord continue to insist that the accord is the ultimate expression of Mr. Mulroney's much-wanted national reconciliation. They say that by obtaining the Quebec government's signature on the Constitution, the Meech Lake accord will strengthen national unity. In my view, nothing could be further from the truth. On the contrary, the Meech Lake accord demonstrates perfectly why Mr. Mulroney's national reconciliation means national disintegration.

I want to show how the accord will have a profoundly decentralizing and divisive impact on our federal system. I want to show how it is going to lead to greater disharmony between the federal

and provincial governments, and I want to show how it will put in question our future ability to function as a single sovereign nation.

First, I will make a few comments about the overall impact of the accord. The accord will fundamentally change the nature of our country and our society in a way that betrays the Canadian tradition of seeking greater social justice and a fairer, more compassionate society. The accord betrays the Canadian tradition of respecting and promoting basic rights and freedoms and it undermines the Charter of Rights and Freedoms. The accord will gravely weaken the ability of our national government to reduce inequalities of income and opportunities among Canadians, and its ability to protect the weaker regions of the country.

It will result in an irreversible shift of political dynamism on matters of national importance from Ottawa to the provinces and will lead to increasing disharmony and disunity. Canada is already one of the most decentralized federations in the world. The Meech Lake accord has the potential to make us ungovernable. Yet all this is occurring at a time when we have more need than ever for strong national leadership to meet the unprecedented challenges that we face today.

These include adapting to the global technological revolution, improving productivity and competitiveness, eliminating poverty and unemployment and reducing disparities in income and wealth among Canadians. But, under the influence of the Meech Lake accord, critical policies on national and international issues will be reduced to the lowest common denominator of rival provincial interests. The dynamic competitive element of our federal system that has made us a progressive nation and a diverse yet compassionate society will be irreversibly extinguished.

Our sense of national community and national identity will gradually be eroded, together with our ability to survive as a sovereign nation. This process will simply be accelerated as the north-south links with the United States are strengthened through an equally flawed bilateral trade deal.

The noted sociologist Raymond Breton recently made a critical and sobering observation about Canada's future as a nation. He points out how, on the one hand, the Meech Lake accord emphasizes the provincial level of social organization and provincial institutions; then, on the other hand, the bilateral trade agreement with the United States promotes and bolsters institutional development at the continental level. The prob-



lem is, however, that the national society is being neglected in the process. Canada, as a distinct level of social organization, will be progressively eroded by emphasizing developments in the other two directions; that is, provincial and continental.

We seem to be taking it for granted that there is no need to preserve and promote Canada. This is a dangerous illusion. The inevitable result of the Meech Lake accord is going to be a blurring of our international personality as provincial governments play more prominent roles both in national policy and in international affairs. The recent Sommet de la francophonie in Quebec City in September 1987 demonstrated all too clearly the dangers that this poses to our internationalist tradition and the respect that we as a nation have traditionally been able to command abroad. This applies to all our key areas of international activism, whether it is peace and security matters, human rights, global environmental protection or international development.

Confusion is now emerging over who speaks for Canada. One day, Secretary of State for External Affairs Joe Clark announced that Canada would write off some of the debts of some of the francophone African countries. The next day, the Premier of Quebec, Robert Bourassa, argued that the repayment of many Third World debts should be linked to their export receipts.

Many people both within and outside Canada would say that both of these are highly valuable suggestions. But now who speaks for Canada: Alphonse or Gaston, Joe Clark or Robert Bourassa? If you want to influence Canadian foreign policy, where should you go: the provincial government or Ottawa? Clearly this is not an acceptable way to develop and to implement Canadian foreign policy.

More generally, the significant weakening of the national government and the undermining of the charter under the Meech Lake accord will make it impossible for us to pull together as a people to meet the tough domestic and international challenges that lie ahead.

We will be unable, for example, to implement an effective national telecommunications policy to assist us in the transition to the global electronic society. If you think that Flora MacDonald has problems now with trying to produce a long-awaited national telecommunications policy, you ain't seen nothing yet.

We are also going to be unable to assert a credible national presence in our financial

markets, such as through the long overdue creation of a national securities commission. Yet, in today's world of instant globalized capital flows, this is an important element of sovereignty, and we have already seen how this is becoming increasingly necessary in the wake of the October stock market crash. But again, all those proponents of it, like Andrew Kniewasser and Brian Steck and all the people in the financial community who are now speaking out in favour of it, have got a long time to wait, if not eternity, if the Meech Lake accord goes through.

Another example: we will be unable to pull together to establish firm national environmental protection policies and standards to follow through on the path-breaking Brundtland report, and that is the international report that set out a new course for our sustainable economic development.

Finally, we will be unable to undertake the critical social policy reforms that are required not only to promote greater social justice, but also to improve our productivity and competitiveness. These include the integration of our employment and social assistance policies, a meaningful child care and parental leave program—and I will discuss that further a little later—a comprehensive disability insurance scheme, a national science and technology strategy—a real one, that is—and new education and training strategies.

These all involve areas of overlapping federal and provincial jurisdiction and necessitate the effective co-ordination of federal and provincial policies. But most important, firm national leadership is essential to get us to first base if we really believe that all Canadians should be the beneficiaries of progressive policy initiatives.

I want to note here that I am not saying the federal government is always going to be the good guy or the initiator of progressive policies. In fact it was not in medicare, and in fact I think we have a terrible federal government right now. But what I want to say is that in a province, such as a good province, as some might say in Ontario, some progressive social policies may be put forward—and I expect they will be in the wake of the Social Assistance Review Committee report—then at some point we want a federal government to be able to sit back and say, "Hey, this is working and we think that all Canadians should benefit from this; and it is something that will increase mobility and enable Canadians to move to where the jobs are."

Unfortunately, the danger is now all too real that, with the Meech Lake accord embedded in our basic law, it will be impossible to bring the

necessary degree of national leadership to bear and there will be nothing left to prevent us from slowly sinking below the 49th parallel.

Fundamentally what is at issue here is the future of Canada as a single, sovereign, bilingual and multicultural nation, as a diverse yet compassionate society. At issue is our ability to hang together as a people and to meet the tough challenges that lie ahead. Yet our politicians seem curiously blinkered, unable to rise above narrow partisan interests to articulate how seriously the national interest is at stake in the process of constitutional reform.

It is astounding, for example, to listen to our provincial politicians here in Ontario castigating the bilateral trade deal for its catastrophic impact on Canadian sovereignty and its unacceptable constraints on both the federal and provincial governments. The irony is that when you hear the provincial Attorney General, Ian Scott, arguing eloquently—and here I quote—“The free trade debate is about people. It is about to whom, if anyone, they may look for the social and economic policy they require,” you could just as easily substitute “Meech Lake” for “free trade.” Indeed, I would argue that the catastrophic consequences of Meech Lake are even more serious than those of free trade, since once the accord is entrenched in our Constitution with the rigid unanimity amending formula, its destructive impact will be impossible to reverse.

### 1530

It is important to make a few general comments about constitutions and constitutional reform and perhaps try to figure out why our politicians react so differently to constitutional reform compared to the free trade debate. First, constitutional reform must not be associated with esoteric legal debates about which subparagraph of what subclause does or does not derogate from some government's power. Equally, constitutional reform is not just an affair of governments and first ministers. It is not about power plays among 11 self-interested politicians sitting around a bargaining table in isolated hothouse conditions.

Constitutions are about you and me. They are about individual Canadians. Our Constitution guides our future evolution as a progressive, dynamic nation. It is a document that is designed to endure for long periods of time. It articulates the fundamental values that are common to all of us and that draw us together, and it expresses our commitment to a fairer, more compassionate society.

Many of these values are now expressly set out in our Charter of Rights and Freedoms and include provisions for mobility rights, broad guarantees of equality, minority language and education rights, and our commitment to multiculturalism. In addition, the Constitution now entrenches the principle of equalization and the affirmative commitment of all governments to promote equal opportunities for the wellbeing of all Canadians.

Clearly, any constitutional change inevitably affects these basic rights and freedoms in addition to altering the nature of the federal system. This includes changing the balance of power between the federal and provincial governments and shifting the balance between the judiciary and the legislative executive branches of the government. So individual Canadians must be meaningfully involved in the process of constitutional reform and not frozen out as we were at Meech Lake.

I am going to go on and outline how the Meech Lake accord is at odds with the vision of Canada and what it means to be Canadian that is held by a vast majority of Canadians. I am going to show why the accord will lead to greater disharmony and national disintegration rather than strengthen national unity. The five areas that I will focus on are the spending power restrictions, the new amendment procedures, the “distinct society” clause, the entrenched first ministers' conferences and the appointments to the Senate and the Supreme Court of Canada.

First is the spending power. The spending power provisions in the accord will seriously weaken the federal government's ability to implement national social and economic programs. This will seriously attenuate our sense of national community and will lead to increasing inequalities of opportunities and standards of living across the country.

We tend to forget how important national social programs are in sustaining and strengthening our sense of national community. They contribute to that intangible element of what it means to be Canadian. This occurs through the establishment of minimum national standards and the assurance that we can go anywhere in Canada and get the same or similar levels of public service, like medicare. You just have to remember the national debate over the Canada Health Act in 1983-84 and the strong resistance across Canada to any erosion of the medicare program through extra billing and through user fees.



The same sort of debate is occurring over child care, environmental protection—especially in the wake of the Brundtland report—a national education strategy and a national science and technology strategy. Unfortunately, the excessive ambiguity of the spending power provisions in the accord and the excessive ease with which the provinces can opt out of any proposed national program with compensation, will mean that we are going to end up with a patchwork of programs across the country with the federal government relegated to playing a sterile role of cash-register politics; and we will have transferred inappropriate powers to an ill-equipped judiciary to determine such key political issues as whether or not a province has complied with the national objectives and so forth.

When this is then combined with the ability of any province to opt out, with financial compensation again, of all future constitutional amendments that transfer power to the federal government, such as those that we had in the past dealing with unemployment insurance and pensions, we are going to wind up with little sense of national purpose in an increasingly balkanized Canada.

It will now be far too easy for a province to opt out of future adjustments to the division of powers that may be required in critical areas of public policy, notably in the areas of environmental protection, telecommunications, science and technology and the integration of our employment and social assistance policies.

Furthermore, this will seriously impair the mobility of Canadians that is so critical in today's fast-paced, technology-driven society. Take, for example, child care. The proposed national child care program illustrates purposely the dangers posed by the Meech Lake accord to our ability to undertake the necessary social and economic reforms.

Despite last-minute denials by the Minister of National Health and Welfare that the program is governed by the Meech Lake accord, it is clear that it was negotiated in the spirit of Meech Lake, as consistently asserted by the government and participants in the post-Meech Lake phase of negotiations. Thus, in an attempt to avoid the possibility of any province opting out of the program with compensation, as would be permitted under the Meech Lake accord, the government has produced the lowest common denominator package that is devoid of national standards.

We have ended up with a policy that simply recycles some three billion dollars of federal

money out of the Canada assistance plan and mainly into a hodgepodge of child tax credits and regressive tax deductions, and that is all over the next seven years. In addition, a mere \$100 million will be spent over the same period on a special initiatives program to encourage innovative approaches to child care on a demonstration basis. The government will pay up to 75 per cent of the cost of provincial startup grants for the capital cost of nonprofit child care centres, with a view to creating 200,000 new nonprofit spaces by 1995, for a total of 400,000. Big deal; it would be hard to devise a more inadequate national child care program.

There are well over one million children in need of quality, affordable child care right now, and some 56 per cent of working women have children under the age of three. Yet most of the federal expenditures will do little to address the critical shortage of child care spaces; and while it may be no longer desirable to treat child care as a welfare issue under the Canada assistance plan, the overall impact of the tax-related changes will be undeniably regressive.

In addition, there is no provision for pilot projects to deal with the increasing number of parents who do not fit into the normal child care system: part-time workers, shift workers, immigrants, rural women and inhabitants of isolated communities. The absence of minimum national standards is equally disturbing. Such standards should stipulate child-staff ratios and staff qualifications and establish requirements for the training of child care workers in health and safety rules. In Alberta, for example, the only requirements for a child care centre's staff are that employees must be over 18 and one worker at every centre must have first aid training.

Finally, the child care program reveals all too clearly the current government's failure to recognize the urgent need to undertake comprehensive reform that will integrate both our employment and social assistance policies and our tax and transfer systems. In particular, it has failed to recognize the importance of available and affordable quality child care to an overall strategy that focuses on human resource development, improved education and training and ensuring that everyone has the opportunity to engage in meaningful work.

Take, for example, the critical related issue of parental leave that was sidestepped by the government's timid proposals. The official justification was that to address parental leave would have required opening up the messy issue of unemployment insurance reform and would have

set off a chain reaction, to use the words of our esteemed Minister of Employment and Immigration. But a year earlier, after a multimillion dollar review of the unemployment insurance system, the Forget commission concluded that it would not be prudent for it to recommend changes to maternity benefits and parental leave in the absence of a mandate to recommend changes to other pieces of employment legislation related to employment standards, social assistance and so forth.

This sort of stalemate in policy development is totally unacceptable. You have one minister saying, "No, I cannot do it, it is the other minister's responsibility;" and the other minister saying, "No, I cannot do it, it is someone else's responsibility." This reflects a clear abdication of leadership on the part of the federal government, and we can only hope that the government will soon recognize the need for a comprehensive review of the full range of current social and economic policies.

But back to Meech Lake. Even if the national government does decide to assert the necessary degree of leadership in the federal-provincial negotiations that inevitably must take place, the political dynamic set in motion by the accord will make it impossible.

#### 1540

I will turn to my second area of concern, that is, the amendment procedures and the extensive veto powers over constitutional change granted to all the provinces. This will not only preclude meaningful Senate reform and the creation of new provinces—and I know that you have heard from many northern Canadians, including earlier this afternoon, I think—but also it is going to unacceptably increase provincial bargaining leverage across the full range of federal-provincial issues. It will enable the provinces to use the veto to extract concessions in a whole range of unrelated areas.

Finally, it is going to lead to political blackmail and paralysis and risk effectively immobilizing our federal system and our ability to hang together as a nation. When I try to explain this to people, it always brings to mind something that a friend in Newfoundland said to me in the first few days after the accord was announced back in May. He said, "Oh, great, now we have a veto over western wheat." At first glance, that seems incredible, but it is exactly what is going to happen. You are going to have Premier Peckford saying to Premier Getty, "I do not think we can really give you what you want in Senate reform until we listen to what you have to tell us about

fisheries." That is exactly what is going to happen, although I am sure that you are all aware of what goes on in federal-provincial negotiations.

My third area of concern is the "distinct society" clause. The amendment dealing with Quebec as a distinct society will allow the Quebec government to override the charter and to increasingly isolate itself from the rest of Canada. What is important to recognize is that this is not just of concern to Canadians in Quebec. It is the overall integrity of the charter and our commitment to preserve and promote basic rights and freedoms that is being undermined. That has to be of concern to all of us.

In addition, as Quebec becomes increasingly isolated, the rest of Canada will be unable to benefit from progressive policy initiatives in Quebec, as we have in the past, and as we ought to in a dynamic federal system. This is where we have to remember that constitutions are not just a matter of legalese and of legal challenges before the courts.

Our Constitution is a symbolic document that is used in political battles, such as the once and future battles over the separation of Quebec. Here, I would just pause to say that contrary to what Premier Peterson and others say, that we must have Meech Lake because of the revival of the independence movement in Quebec, I say quite the opposite. Just give Jacques Parizeau the "distinct society" clause and see what he is going to do with it. We already know from people like Claude Morin that he sees this as quite compatible with his *épatiste* approach to the separation of Quebec.

In addition, in recognizing the Constitution as a symbolic document, it is also something that is used in ongoing lobbying efforts with governments and our legislatures in a wide range of critical areas of public policy. For example, we might find ourselves at some point lobbying a less-than-progressive Premier in British Columbia to adopt some legislative initiative that Quebec has undertaken, such as those in the past dealing with consumer protection or with no-fault automobile insurance.

However, we will henceforth be met with an additional objection that the Constitution has designated Quebec as a distinct society with special powers and that what is considered good for that distinct society is not necessarily relevant to the rest of Canada.

In any event, I would like to suggest that the "distinct society" clause approach to accommodating Quebec's special concerns for linguistic



and culture security is misguided. Not only does it unacceptably equate linguistic groups with a particular geographic location, but also it provides insufficient guarantees for both the anglophone minority in Quebec and for francophones outside Quebec. I know you are hearing this from many groups that have already appeared before you. As Raymond Breton notes, it transfers broad powers to the courts to decide matters of central societal importance, such as exactly what does constitute the distinct society and distinct identity.

This last point I really want to emphasize, because you heard Lowell Murray and his minions and you heard many others, including Gil Rémillard, when he was put on the spot by the Franco-Ontarians the other day. They all love to argue and say that section 2 is just great because it recognizes the fundamental bilingual characteristic of Canada.

My reply to them is, have they not read constitutional history and have they not looked at the minority language and education rights that are in the charter right now? It is these provisions in the charter that clearly articulate the bilingual nature of Canada. You just have to read section 16 to see that. This is the historic compromise that provides the effective, although not perfect, answer to Wilfrid Laurier, who could plead only for a regime of tolerance during the infamous regulation 17 debate in Ontario. Also, these provisions are the response to Henri Bourassa earlier in the century who knew all too painfully the dangers of having to rely on benevolent government action to protect minority rights.

Now, with the provisions in the charter, we have unique, legally enforceable language and education rights that are reinforcing our commitment to bilingualism across the country, and they are providing invaluable support to the francophone minorities outside Quebec.

This all came to mind when I was watching the Journal special—I am not sure whether you caught it on the last two nights—on bilingualism in Canada. If you did not catch it, then they probably have videos of it that you could see. It was excellent. It demonstrated only too clearly that there is a whole new generation of Canadians out there who are growing up committed to preserving and promoting the French language and culture across the country.

The important thing to note is that this sends positive signals to Quebec. Even on the Journal program, eminent Quebec journalists like Lysiane Gagnon and Lise Bissonnette acknowledged that it made a difference, in the process of

building up Quebecers' confidence in both themselves and in Canada, that the rest of Canada was clearly making efforts to promote bilingualism. They said this played an important role during the referendum debate in 1980.

It was frustrating as I watched The Journal and realized how much Canada has changed over the course of the 1970s and 1980s. It just reinforced my view that in concluding the Meech Lake accord, the first ministers are completely out of sync with the Canadian people, including Canadians in Quebec, and they have completely misread Canadian history. It is just so frustrating to see how quickly the present slips into the past, but how long it takes before historians can catch up and write something that will indicate exactly what the impact is and where we are going. I hope you are listening to the historians and the political scientists, because almost to a person they are concerned about the Meech Lake accord. I say that with due respect to the so-called Queen's provincial loyalists in Kingston.

The problem is that the "distinct society" clause is taking us backwards, because it is effectively undermining the historic compromise in the charter that has moved us forward towards the ideal of a bilingual, multicultural nation. It is going to potentially allow Quebec to undermine the minority language and education rights and other charter rights, given its special role to preserve and promote its distinct identity, its distinct society. It is going to weaken the links between Quebec and the francophone minorities outside Quebec, where the French language and culture are flourishing—in a different environment, all right, but they need that link.

Equally important, by requiring the other governments to preserve only the fundamental characteristic—which is defined, you should know, in terms of English-speaking and French-speaking populations, not in terms of a society or something that implies institutions—by putting only that obligation on the governments outside Quebec, it gravely weakens the political momentum and the commitment to promote the interests of the francophone minorities outside Quebec.

This is why you are hearing so many concerns expressed by l'Association canadienne-française de l'Ontario and—I know they have been here—the Fédération des francophones hors Québec; the Canadian Jewish Congress, which I was reading about yesterday; I am not sure what Alliance Québec said today, if they made it; les Acadiens du Nouveau Brunswick—I am not sure if they are here, but they are certainly putting pressure on Frank McKenna; and all these

groups. They know that it is no good to wait for a second round. With the Meech Lake accord entrenched, the brakes will be on and their political bargaining leverage, moral or otherwise, in future rounds of constitutional reform will be eliminated.

Now, just to make some suggestions about an alternative approach, instead of the "distinct society" clause, we should all be debating a new preamble to the Constitution. If you will remember, this was the initial demand of Bourassa and Gil Rémillard in their five demands.

#### 1550

The preamble should clearly set out the democratic principle of the sovereignty of the people, something our first ministers seem to have forgotten, as well as articulate the distinctive characteristics of the Canadian nation and society and our commitment to greater freedom, equality and justice for all Canadians. These distinctive characteristics, of course, must include a reference to the distinctive character of Quebec as the principal, but not exclusive, source of the French language and culture in Canada.

In addition, we should seriously consider an elected Senate with a constitutional requirement of a double majority vote in respect of any legislation dealing with language or culture. This is not just an idea coming out of the blue. It has been debated for probably as long as the five demands have been around on Quebec's plate.

We should also consider a special role for Quebec in respect of immigration, not giving it all to all the provinces; a guarantee of three judges from Quebec's civil law milieu—again, not giving the appointment power to all the provinces, and especially when we should be looking at an entirely new appointment procedure to the Supreme Court of Canada, when it is becoming all the more important to know who are our judges who are making fundamental decisions regarding our rights.

Finally, we should consider a veto for Quebec over constitutional change combined with a popular-referendum procedure. It could be along the lines of the one suggested back in 1980; that at the very least this must be accomplished within the broader context of major institutional change, a revision of the current division of powers, negotiations on aboriginal rights and the repeal of the "notwithstanding" clause in the charter.

Meaningful constitutional reform, including the changes required to ensure that Quebec participates fully in our future constitutional

evolution, must take place within this integrated framework. The Constitution belongs to all the people of Canada. It is about our future. It cannot be changed at random simply in response to the exigencies of current political preferences or pressures. With specific reference to the so-called Quebec round, of course, accommodating Quebec's special concerns is important, but not at the price of dismantling Canada. Quebec is an essential part of our country, our history and our society. If Quebec leaves, which I believe will be the inevitable result of the Meech Lake accord, then my country also disappears, and I refuse to let that happen.

I am convinced there is an as-yet silent majority of people in Quebec who are equally concerned to ensure that Canada continues to survive with a strong national government in addition to strong provincial governments. I suggest that you just have to go and start speaking to people who are concerned about the environment, child care activists, women in Quebec. There are women there who are willing to speak out and say there are going to be times when the Quebec government is not perfect, and there are going to be times when the environment minister is not doing as much as he should with regard to the St. Lawrence Seaway, and they will want to be able to pressure Ottawa and get the federal government to bring some pressure to bear. It is the same thing with protection of women's rights and child care or whatever.

These Quebecers' voices have not been heard. Our current political leaders appear determined to shirk their public responsibility to encourage the necessary national debate that can lead to meaningful changes in the accord. This is totally unacceptable.

I will now turn to the fourth area of concern and deal with this more quickly. The fourth area of concern that I want to discuss is the constitutionally entrenched first ministers' conferences. This will lead inexorably to an unaccountable third level of government. It will accelerate and make irreversible the shift in political dynamism on matters of national importance from Ottawa to the provinces. It will prevent the national leadership required to reduce inequalities of wealth and opportunity across the country and to pursue greater social justice and generally meet the challenges that lie ahead.

Parliament and the provincial legislatures, and that includes you, will be relegated to mere ratification chambers. Canada's position, whether on international or domestic issues, will be reduced to the lowest common denominator of



rival provincial interests. Thus, the Meech Lake accord, if implemented, means that we will no longer elect the federal government to articulate and pursue the national interest. Instead, 11 governments, federal and provincial, will collectively speak for Canada and crucial matters of national policy will be determined in regular first ministers' conferences rather than by the federal cabinet.

The fifth area of concern, which I am going to mention only briefly, is the effective transfer to the provincial governments of the power of appointment to the Supreme Court of Canada and to the Senate. This will result in effective provincial control of two critical national institutions and will unacceptably and radically change the nature of our federal system.

I do not have any time to go into the problems that are going to arise as a result of the absence of a provision for breaking deadlocks and so forth. Already, I think we are seeing problems. There is a holdup in Senate vacancies because they have not been able to agree on appointments. If that is a problem now, it is going to increase in the future.

Finally, I cannot overemphasize how the overall impact of the proposed changes will result in a severe weakening of the national government. Equally alarming is that this means that the bilateral ententes we see emerging between Toronto and Quebec City on such matters as access to universities, environmental protection, participation in international conferences like our Francophonie, and now more recently, I notice, government procurement, will become increasingly irreversible and the Toronto-Quebec axis will become the central controlling element in Canadian federalism. This is certainly not my idea of Canada and it has not been the idea of Canada for 120 years.

Having enumerated all these concerns, and everybody always asks me this, you are certainly justified in asking yourselves, how on earth could 11 first ministers, all democratically elected and inspired by the so-called spirit of Meech Lake, have produced such an awful deal? Well, the answer lies in the fact that no one spoke for Canada during the negotiations. No one defended the fundamental values in the Charter of Rights and Freedoms to which the majority of Canadians subscribe. Canadians were frozen out of the process leading to the Meech Lake accord. Our voices were never heard, yet we are going to be haunted by the ghost of Meech Lake long after the Fathers of de-Confederation have passed from the scene.

It is not good enough for the proponents of the accord to reply that the accord is simply a limited constitutional deal with Quebec and that the demands of Quebec have been in the public domain and the subject of discussions for many years. The fact is that we never expected our Prime Minister to simply sit back and accept all of Quebec's demands, while at the same time granting additional concessions to all the other provincial premiers to gain their assent to the deal. This is exactly what happened. How else would we end up with a provision in our Constitution requiring us to discuss fisheries every year?

We never expected the Prime Minister to approach constitutional reform as if he were amending a corporate bylaw, with little consideration as to how all the changes would impact on our rights and freedoms. We elect our Prime Minister to lead a federal government that is unique and distinct from the provincial governments. We expect him to function as something more than simply a chairman of a board of premiers. We expect him, like all our federal representatives, to rise above parochial provincial interests and pursue the national interest. We expect him to govern wisely and to have some sort of vision of the kind of society we want ourselves and our children to live in. Finally, we expect him to seek ways to accommodate Quebec's special concerns that will permit us to maintain our sense of national identity and strengthen our sense of national community.

Clearly, these expectations were betrayed at Meech Lake and the unfortunate result is an accord that is at odds with the vision of Canada and of Canadian society that I believe is shared by the wide majority of Canadians. More important, if ratified, the accord will set in motion unacceptable political dynamics that will gravely weaken national unity and eventually lead to national disintegration.

It is not acceptable to point, as a special joint committee did in its Pollyanna-ish report, to a mythical second round where we are going to correct the myriad of nonegregious errors. This is like giving away the Foreign Investment Review Agency and the national energy program and giving access to our financial markets and then trying to negotiate free trade. Look what a mess we have ended up with.

In conclusion, I want to end with the same warning I made before the special joint committee. Quite apart from all the substantive concerns I have mentioned, the widespread concern with the process leading up to the accord and since that

time is merely a reflection of the profound cynicism with government that is all too prevalent among Canadians today. That our first ministers would even attempt to carve up the future of our country in such an alarmingly undemocratic way has simply intensified the disillusionment with our leaders and our public institutions.

#### 1600

If the first ministers proceed to ratify the accord as a fait accompli, notwithstanding the widespread public concern that is being expressed, particularly in the course of these hearings, this will do irreparable damage to any efforts to restore faith in the political process. It will simply confirm the impression that our politicians are more concerned with their image and brokerage politics than with the concerns and interests of individual Canadians.

Those of us who have been involved in the debate from the beginning know the depth of public interest and concern. Canadians genuinely want to play a meaningful role in shaping the future of our country, our national destiny. We understand the issues at stake, the special concerns of Quebec for linguistic and cultural security, and we want an opportunity to shape the outcome.

At this stage, we are all depending on you to make up for the evident void of national leadership. We are depending on you to demonstrate a sense of history and to speak for future generations of Canadians for whom our present will soon be their past. They are the ones who will suffer the consequences of the accord and yet will have no mechanisms to hold us accountable.

What will we and the history books tell them? Will we tell them that we only looked for egregious, unbelievable errors; that we ignored the serious concerns raised by northern Canadians, women, the disabled, ethnocultural groups, native Canadians, environmentalists, educators and so many others? Will we tell them that 11 men decided the accord was so fragile that it could not withstand the rigours of democratic debate? Or will we tell them that meaningful public debate did finally take place, that our political leaders listened and acted upon our concerns and that we then concluded a better accord?

The choice is ours and clearly the second scenario is the only acceptable one, so we are counting on you to make these hearings meaningful. We hope you can persuade Premier Peterson to show vision and leadership, and convince him

of the critical need to reopen the accord and go back to the constitutional bargaining table.

You can advise the Premier that if he really wants to assist in nation-building, he could say that having consulted the people, Ontario does not believe the country is well served by enhancing the provincial veto power over constitutional amendments. He could say he is prepared to negotiate a new amendment formula that is more flexible and that, for example, incorporates a popular-referendum procedure combined with a veto for Quebec.

He could say that he is persuaded Canadians really want to ensure the pre-eminence of our charter and that he is prepared to renegotiate the "distinct society" clause in the context of a new preamble to the Constitution; again, something that was initially demanded by Quebec.

At the same time, he should reaffirm Ontario's commitment to preserve and promote the bilingual and multicultural character of Canada as already set out in our Constitution in the provisions for minority language and education rights in section 27. He should then reaffirm Ontario's commitment to declare itself officially bilingual in the near future. In the spirit of nation-building, Premier Peterson should also say that he does not believe all provinces require a constitutional role in immigration or in the appointment of Supreme Court judges and that Quebec's special concerns in this regard should be addressed on their own.

He could say that he is prepared to consider restrictions on the federal spending power, but in the broader context of revising the current outdated division of powers and clarifying, for example, what exactly is meant by areas of exclusive provincial jurisdiction. Any such amendment must also ensure, in clear and unambiguous terms, the federal ability to establish effective national programs with minimum national standards.

Finally, Premier Peterson should vigorously promote meaningful Senate reform and such ideas as a requirement for double majority votes in respect of linguistic and cultural matters.

These renewed negotiations should be viewed in a positive light. They will provide a constructive opportunity for all Canadians to examine the significant challenges to the Canadian society and economy that lie ahead and the respective roles the federal and provincial governments should play in meeting those challenges. They will allow all Canadians to discuss alternatives to the Meech Lake accord that will accommodate Quebec's special concerns, but at the same time



strengthen our sense of national community and national identity rather than lead to national disintegration.

Our governments and first ministers must recognize the broader public interest involved in constitutional change. Nothing less than the future of Canada as a progressive, dynamic nation is at stake.

**Mr. Chairman:** Thank you very much for a very full and well thought out paper which I think has more ideas and points in it than we are going to be able to cover in our questioning.

**Ms. Coyne:** I brought some copies.

**Mr. Chairman:** Good. We are indebted to you for taking the time to think that through and to put together a package. We will start the questioning with Mr. Eves.

**Mr. Eves:** You have addressed many of the questions as we went along. It was a very well thought out and forceful presentation. This is probably a rhetorical question at this point: I presume you think the accord is so flawed that it could not possibly be salvaged in its present form and that we should really start anew with some public input.

**Ms. Coyne:** Yes. It may be sort of rhetorical in the sense that I guess I have answered it. It really is. I will not reiterate what I said, but I stand by it. People ask, "How could this possibly happen?" I stand by what I said about our Prime Minister. It was produced in hothouse conditions and I really do not believe that they, the first ministers, realized the impact it was going to have and that constitutional reform cannot be undertaken any longer in those kinds of circumstances.

**Mr. Eves:** That leads me to the next two questions, and you may have already answered this one, that I had written down as you were making your presentation. Why do you suppose that the 11 first ministers, and especially the Premier of Ontario, agreed to the accord in the first place and why have they all sort of agreed to an unwritten pact, if you will, that there will be no changes whatsoever and that any change at all might unravel the entire deal, as they put it? For example, what did Ontario get out of this? Why would the Premier of Ontario agree to this?

**Ms. Coyne:** I do not doubt the sincerity of some of the premiers, or most of them, that they want Quebec to sign, but when you go into a negotiation where the Prime Minister is not demanding and is giving you everything, what can you say? In the context of negotiations, I presume you are not necessarily going to say no and those of us outside were not privy to exactly

what would happen. I presume, and I have heard, that several premiers did protest and raise complaints, but that they really thought this was just getting the Quebec issue out of the way.

It is rather the same misguided way in which Robert Bourassa and the Prime Minister think, "Let us just acknowledge Quebec as a distinct society and then we are going to get the constitutional issue out of the way and that is going to be fine." The trouble, as I have demonstrated here, is that they are answering yesterday's debates with yesterday's questions. Even the Quebec population is way beyond where Robert Bourassa thinks it is. I think it was a power exchange too. They just did not realize they were impacting on rights and freedoms and that is why we ended up with this flawed package.

**Mr. Eves:** Why do you suppose the 11 first ministers, almost to a person, with the exception I might add of Premier Bourassa, have refused public hearings? At least, they refused public hearings between the first draft in late April and the final draft in early June. For example, this Premier was asked in question period if he would appoint a committee of the Legislature to hold public hearings before the final draft was agreed upon and steadfastly refused. Then after the meeting in June, when Brian sort of gave them the nod, some of them came out afterwards and said, "OK, we will hold public hearings now but we will not change it."

**Ms. Coyne:** My only answer to that is that, first of all, it is of course unacceptable that they are not holding public hearings. They are completely out of sync with the Canadian people. They do not realize that constitutional reform does not just involve first ministers. As I have said, it impacts on all of us and we all want to be involved in it. It is as Alan Cairns said—I do not know whether he is appearing here; he should if he is not—"Whose Constitution is it anyway?" Things have changed since 1982. It is no longer a question of trading powers—legislative, executive, whatever—among first ministers. It involves people. We have rights and freedoms we can assert against all governments. We have to be involved in constitutional reform.

## 1610

All I can say is that the first ministers, especially those who are refusing public hearings—I am going to give Premier Peterson the benefit of the doubt for the moment that he is going to listen to this and that you guys will be able to persuade him—are proceeding in a totally unacceptable way. They are going to suffer the

consequences in the future because, unless my instinct is completely off, the Canadian people do not support this kind of treatment.

**Mr. Cordiano:** I too would like to thank you for a very eloquent and forceful presentation. Certainly, I have a great deal of respect for your views. Let me start with perhaps the least difficult question; that is, in terms of posing the question, not in terms of trying to solve the question. It is something we are all grappling with, the entire process of constitutional reform and how we have more meaningful public participation. Can you elaborate on that?

We may not be able to change the process as it stands now with regard to this accord, but we are looking to ongoing constitutional reform. That may or may not be the case. All I am saying is that we have an accord before us with respect to constitutional reform. We have to deal with it in the manner that has been set out. I just think we have to proceed from here if we are going to deal with it in a different fashion, one that is more meaningful for public participation.

**Ms. Coyne:** I have to preface my remarks by saying that you can change the accord and I proceed on that basis. I will throw out some suggestions but that applies to reopening the accord as well.

In fact, I participated in something dealing with the Commonwealth Parliamentary Association and set out in more detail—I brought a copy of it with me—some ideas of how we might set up an ongoing mechanism.

One way, of course, is to establish legislative committees in the different provinces and at the federal level and require hearings and provide the opportunity for people to appear and make suggestions. What you have to do is identify different stages of constitutional reform: the stage where you are initiating it and putting together the proposals, then the stage of looking at them and then the question of ratification. There we are into another thing. Right now, all it requires is a majority vote or whatever. We should be looking at other mechanisms such as a special majority vote in legislatures.

The more important mechanism that may open up the process as well is the idea of a referendum procedure. I am very firm in putting that forward. I know there is lots of support for that kind of mechanism. It is in this paper that I brought down. There have been suggestions in the past—there was in 1980—and there are examples you can look at, other countries. Gil Rémillard and some Quebecers supported the idea back in the early 1980s. We have had referendums in

Canada. It is a way of generating public debate. I cannot think of all the details, but it would generate a structure through which popular input would be put in.

In terms of the process at this point, one way is to set up legislative committee hearings and really go out and listen to the people. In terms of reopening this accord, this means doing it in every province. I assume you guys are listening and are going to write a reasonable report, but other provinces have not held hearings, and even Quebec did it only in advance of the Langevin hearing. I do not think we have heard the voices of all of Quebec. There is going to have to be a decision that we have meaningful hearings in all the provinces and something will have to be done to redo the situation in Ottawa. At least the Senate is having meaningful hearings, but the special joint committee was obviously unacceptable.

I am just trying to bring it back to tell you that it has to be done in respect of this accord. That means across the country. I should just say that if, for example, this committee is considering travelling outside Ontario, as I understand it might be, then there is an obligation on you to go everywhere in Canada. It is not just a question of going out to Quebec. As I said, the Constitution belongs to everyone. I would be perfectly willing to help you find people in every province who would be willing to assist you in having hearings, especially the ones who have been denied hearings in Alberta and Saskatchewan and, it sounds like, in British Columbia.

**Mr. Cordiano:** It seems to me that your suggestion about holding a referendum—that is with specific reference to language and culture; is that what you are talking about?

**Ms. Coyne:** Oh no, I was referring to referendums on constitutional change generally.

**Mr. Cordiano:** What sorts of constitutional change? It seems to me that what we are doing now is virtually moving in the direction where we are going to be constitutionalizing every difficulty we have in our society. That seems to be the direction we are going in.

**Ms. Coyne:** You mean if we adopt the Meech Lake accord?

**Mr. Cordiano:** No. Prior to that. With the advent of the Charter of Rights, citizens have the opportunity to bring whatever concerns they have to the Supreme Court to determine whether their rights have been denied, etc. That will inevitably lead to conflicts in our society where



some of these issues will have to be resolved constitutionally in one way or another.

**Ms. Coyne:** Perhaps I am misunderstanding you, but I do not see that difficulty at all. The charter and our ability to go to the Supreme Court of Canada, if necessary, to defend our rights—and that includes language and education rights and whatever—is a great thing. It is an addition to our federal system; it makes us more dynamic. We now have an additional outlet where we can go and say to both levels of government, “You can’t do that; we have certain basic rights and freedoms.” I do not understand how that is institutionalizing difficulties.

**Mr. Cordiano:** Perhaps what I was trying to get at was that when we are trying to make constitutional changes, and I believe that you obviously could not have the situation where Quebec is not in the Constitution, we were going to have some sort of constitutional accommodation of Quebec or reach some sort of agreement. You are not suggesting that Quebec be left out of the Constitution.

**Ms. Coyne:** No. I have put forward an alternative, in fact.

**Mr. Cordiano:** That is what I am saying. So inevitably we would have some sort of constitutional conference, and whatever scheme was designed, if we did not have Meech Lake.

**Ms. Coyne:** Yes.

**Mr. Cordiano:** What I am saying is that inevitably there are more groups that are interested in constitutional reform, and the average citizen perhaps may be interested in constitutional reform. We have to grapple with what that means in terms of the time that is required to do this and in terms of the resources available to us as a nation to do this, because that will be an ongoing thing. Indeed, from this point on, if we are going to have annual conferences, we are going to have to try to work that out somehow.

**Ms. Coyne:** You are assuming, first of all, the Meech Lake accord is going through, and again I will assume that it is not. For example, let us talk about the alternative way to accommodate Quebec. Of course many more citizens are interested; that is a good thing. Sure, it makes things complicated, but that is democracy. What I think could happen here is an example; you are hearing from a whole range of people, groups and individuals right now.

Let us say hypothetically, supposing there had not been any suggestions, that Quebec had come forward with its five demands. You could hold

hearings and say: “OK, people in Ontario and in every other province would do this. Here are Quebec’s demands. Let’s hear what you have to say—alternatives, etc.” You would write a report saying, “We do/do not accept this; this is what the people in Ontario think.” Again, I am just thinking out loud here, but similar kinds of hearings would take place federally.

Then you would have a federal-provincial conference—again, I am setting aside for a moment the possibility of a referendum—where you would hammer out the acceptable package. That is where leadership comes in, and that is where we have to get into a situation where at least we have a Prime Minister who is going to talk for Canada and say to some of the provinces: “Well, Newfoundland, we really don’t think fisheries is relevant to accommodating Quebec. We don’t think it is necessary to debate Senate reform every year; let’s have it right now and accommodate Quebec.” That is where the leadership comes in; that is where you would finalize again. The next stage might be to have a referendum, if you then want to get the referendum.

That is one way that you could do it. That is one way you could funnel in groups and accommodate and be able to deal with the many more Canadians who are interested in constitutional reform. I think that is great. You just have to be imaginative and think up ways to do it.

## 1620

I am suggesting, in terms of reopening this accord, you could start the process. As I say, we have a void in Ottawa. You are in the strange position of being the first group that is actually holding, we hope, meaningful hearings. You could come out and say, as I have suggested—and you do not have to accept all my suggestions: “We are hearing this. If it has to be reopened, we want to make it clear to Quebec that we want to deal with their special concerns especially and not just give them everything they want. Here’s our alternative. Over to you, federal government. Get your act together.”

**Mr. Cordiano:** I just have one final question, as we are running out of time. It ties somewhat into the area of spending powers. It seems to me that what you are implying—and I just want some clarification on this—is that we should stipulate constitutionally what we mean by national objectives or national standards. I know that “national standards” is the preferable phrase for many groups, but what I am getting at is, should we have in the Constitution, for example, a stipulation whereby we are saying that programs

in the social area should have these qualities or these objectives, such as universality, affordability and those kinds of things?

**Ms. Coyne:** If we are talking generally about how to entrench some restrictions on the federal spending power, I do not want to just deal with one element, because obviously I have expressed my concerns about the entire way it is being done here. I just want to preface my comment by saying that no matter what you put in, even if you mention national standards, one of the problems that you have to make sure that you avoid right from the very beginning is not to build in disincentives to the federal government even initiating a program. That is what is going to happen under the Meech Lake accord with the opting-out procedure. I have to address this first.

**Mr. Cordiano:** I do not understand that.

**Ms. Coyne:** Because the provinces can opt out with financial compensation, you are either going to end up, as we did in child care, with a program that is just money going out to the—

**Mr. Cordiano:** Is that not a lack of will on the part of the national government? The standards or objectives could have been very carefully outlined.

**Ms. Coyne:** But under the spirit of Meech Lake, they could not do that, and the minute they did start setting some standards, as I suggested here, the provinces would try to exercise their right to opt out with financial compensation.

Let us just assume that is the case. Let us not even worry about that. The ambiguity is there, the sense that says: "Oh God, we have to make sure whether this is a national standard that will be going to the heads of the federal bureaucrats. Is this a national standard that Quebec might want to opt out of, or any other province might want to opt out of? We had better change this language, or let us negotiate a bit more."

I am talking about disincentives that are being built in way back in the process, so that we are going to end up with either a lowest-common-denominator program or no program at all, because what federal government is going to want to announce a program, get absolutely no credit for it and just be passing money over to the provincial governments?

Now, getting back to your point: If we do have to entrench some restrictions on the federal spending power, then you have to go back and look at some of the past proposals. There have been proposals in the past whereby, for instance, at least when there was opting out, there would be payments directly to the people in the province

and there were more disincentives in the proposals to a province opting out.

My bottom line in what I said today was that we really want to minimize opting out. What is opting out? Does a province only conditionally belong to Canada? If it does not like something that goes on nationally, it opts out?

We have to look at the changed situation, mobility rights and all this. If I want to move to British Columbia, but they have a crummy child care system and I have children, I am really going to decide that maybe I do not want to move there for the job, even though it is a better job. All these kinds of things have changed.

Back to your point: What do you put in? Of course, I want to preserve the ability to set minimum national standards. That is not even there right now. That is clear. I am sure you have heard all the arguments—

**Mr. Cordiano:** I do not know if it is clear.

**Ms. Coyne:** Because it is mentioned explicitly in the immigration sections and not mentioned in the spending power sections, there is no doubt in my mind that a court would say—and the courts are now inevitably involved in this, as they should not be because these are political issues—they cannot set national standards. But even assuming that they can, how detailed should you get? I would say—here we are just getting into legalese, and I do not want to get into that; my students would be amazed if they heard me getting into the legalities—that is almost a drafting thing.

You have to sit down and say, "How detailed do we want to get?" I would say probably you do not have to get that detailed. You do not have to set out comprehensive public administration, and five points on the medicare perhaps, as long as you have national standards and public debate has taken place, so that if it ever went to the courts, they would say, "Well, it was clear that this was meant to apply to the medicare situation."

You would not want to hamstring the government completely, and that gets back to the fundamental issue: What do you put in a constitution and what do you not? What is constitutionally relevant? Whatever you stick in a constitution potentially is going to end up in the courts. We do not want courts—I believe in leaving flexibility for the governments when you deal with political issues. Yes, you do not want to get too detailed, but at least make sure that they can set minimum national standards.

**Mr. Chairman:** I am just mindful of both your time and also—are you still all right?



**Ms. Coyne:** Yes. I am all right.

**Mr. Chairman:** If a couple of members disappear, it is not because of your comments; there are some who have to get a plane to London, Ontario, and I just did not want you to think they were leaving for some other reason.

**Mr. Elliot:** Is there going to be another presentation this afternoon?

**Mr. Chairman:** No. As we said, the other person is not here—is in a plane, in fact.

**Mr. Breagh:** I have argued for some time now that this process is intolerable, that so far what has transpired here is undemocratic, not wise and real dumb. I think I would disagree on a number of areas with your assessment of what this accord means and whether the sky is falling and disaster is imminent and a range of other things, but that is pretty normal.

What I am concerned about is that we have to change this process around substantively. It seems to me, whether anybody in the world wanted it to as we began these hearings, that change is happening. This afternoon, if people do not want to pay any attention to us, that is fine; but we are going to a lot of expense and bother to televise these proceedings and put them on a satellite. Anybody in Canada who has a mind to and has nothing better this afternoon can watch the proceedings and send us a letter, saying, "You jerk, you are wrong again."

The process is evolving into something that I think is a little more defensible. I do not take away for a moment from the fact that Brian Mulroney was elected Prime Minister of Canada. I do not know how that happened. I cannot find anybody who will admit to any responsibility for it, but it did happen. But he was not elected, in my recollection of it anyway, to go away with 10 other people, privately, and rewrite the Canadian Constitution. I do not remember seeing that in anybody's election platform. None of our premiers was elected on that basis either. This concept, which some have made legit by calling it executive decision-making, is alien to a parliamentary system, and it is alien certainly to Canada.

What I am concerned about is that we now make our assessments of this accord, as this committee has attempted to do now, make our judgement calls as to whether it is good, bad or horrible and whether we can live with this or not and then turn our minds to the process question, which you have addressed in a number of the things that you had to say this afternoon.

I really think it is critical now that we do two or three things. First, we must recognize that there

is a Constitution at work in this country and, new as this idea may be to us as Canadians, that it makes things work a little differently. Up until now, Supreme Court decisions did not change the way provincial governments offered programs the next day; now they do. People have rights, which they are just beginning to explore, under the Constitution, and some are arguing they have had them taken away in this agreement before they have even had a chance to exercise them. I think we do have to turn our minds to that. Some of what you had to say, I think, dealt with that process question. I would not get quite as elaborate as you did in your recommendations about referendums and things of that nature.

### 1630

If I were to put a criticism to the Meech Lake accord as a package, it is that in the end, when you have dissected all the parts and analysed how it goes—you do have to make a judgement call, whether anybody likes it or not, about whether this is good or bad for the country—it is missing any fire or any vision. You know, we often accused Trudeau of having hallucinations rather than visions, but at least he was working in that area; you could say there was something good about the man. But I do not see much in this agreement that is visionary, that speaks about what kind of nation we want to have.

Maybe people will argue that we already did that last time and we do not need to do it again. I would criticize this agreement for not going far enough in many areas. They just could not make up their minds, so 11 people kind of dithered around and struck a deal; it may result in being hamstrung. The greatest concern I have with this process is that at the end of it I am really getting more and more concerned as we go on that this could be an intolerable situation out of which there is no escape. If we actually do get 11 first ministers, operating on an annual basis, creating this kind of mess, we will never survive the thing. The lawyers will be happy, but the people will be sad.

I would really like to hear a little bit more from you about how we rectify this process. Before you start, I really want to put on the table that whether anybody in this room likes it or not, this process changed the day this committee set up shop, opened up the television cameras and put out a signal. I do not think you can reverse that. If people were advocating a secret, no-amendments, "everyone rubber-stamped this" process, you cannot do that and have public hearings at the same time.

I know that the joint committee had a rather unusual approach to its set of public hearings. It was probably the first private set of public hearings held in Canada, but they did that. To their credit, they went through the process and wrote their report as good parliamentarians do. But this one is a little different. I am just interested in how you would pursue it from this point on.

**Ms. Coyne:** I could not agree with you more. I do not have to reiterate about how the accord exhibits a lack of vision and is an intolerable situation, although I think—I am the eternal optimist—there is an escape, it has to be reopened, and that somehow the democratic will is going to prevail and the voices of all the people who are so concerned about it and complaining about it are going to be heard eventually.

How do you get out of it? Without reiterating what I am saying, at least you guys are saying that you are listening to us. You can see by the response, and I am assuming you have hearings now for almost two months, that there are a lot of people out there who are interested and who are coming and expressing their concerns.

You are right. Things have totally changed. This would not have happened in pre-1980 days, anyway, because we certainly saw even in the 1980-81 period a lot of groups and individuals getting involved in the process. Then we had hearings that actually led to changes in the accord leading up to 1981 and even after the November package, if you will recall. The politicians listened and there was give and take.

Right now, we are hoping that you guys will at least set the example, but we are in a particularly awful situation right now where we have to convince the Premier, because it is not your word alone. He is increasingly giving some signals that he is not listening; you have to convince him to go back, because currently the actual amendment formula that is in our Constitution says that these 11 guys can sit around the table, and once resolutions are passed through the legislatures, the process goes on.

The thing is that there is a difference between that and constitutional morality or whatever you want to refer to it as. What you are seeing here is that the Constitution no longer can be viewed as the preserve of 11 men, it belongs to the people, and there has to be a different kind of process. I for one would have much preferred obviously to have been able to avoid the kind of amendment formula that ended up in 1981 and ended up with the referendum procedure that was in place in 1980.

Anyway, let us take it from the situation we have right now. Part of what you guys need to recommend in addition to, as I would say, an alternative package for Premier Peterson to go back to the table with, is a new amendment formula too. There has got to be a provision in there now for open hearings in every province because, of course, it is unacceptable that it is going through provinces without any hearings. We all know, because of the parliamentary system, that if you have got a majority in the House, they toe the government line and it is game over.

I would suggest that you also put in some recommendations about, at the very least, mandatory legislative committee hearings in every province and, federally, some suggestions about the various stages. Hearings should even be held at the stage when the agenda is being set. You should call some people who are parliamentary experts like John Holtby—I think he has appeared before the special joint committee—and others who have been involved with parliamentary reform. They could perhaps give you suggestions as to how to structure something. You may not want to entrench all the details again in a Constitution, but I think we really have to look at a different constitutional amendment formula.

My preference would be also to look for a referendum. Heaven forbid that this could happen, but if there was a national election where this became an issue—and it could very well become an issue, although we still seem to have a void of national leadership—then you might get some public debate going and some support and get some indication of where the public is at. But, at the very least, I think you could go forward and make some recommendations as to a better structured system that would impose obligations on at least all the premiers and require open votes, for example, or ways in which the people's voice could really be expressed.

**Mr. Breagh:** One area where I sense that you and I would differ a fair amount in that I sensed in what you had to say that you have this strong belief in a strong, central, federal government. I have that in a sense, but it is certainly mitigated by the simple, hard fact that with a very strong, central, federal government for more than a century we have been unable to meet our legal obligations to our aboriginal people. That is one of probably 900 different examples of things that have not happened.

I am not persuaded that there is not a better way to govern this country or at least that some alterations could not be put in place that would be



better. I think what I am hoping for is that there might be an outbreak of democracy somewhere in this country. It could rear its ugly head at any moment, you never know. People might get interested in this kind of stuff. There might be an opportunity at various legislative buildings throughout the nation for people to express their opinions.

I think there is a bit of awareness now in Canada that "this constitutional stuff has something to do with me." I think there is a vague sense of "I am not quite sure what that relationship is, but these people are making decisions under challenges to the Constitution and they do seem to be changing the circumstances under which I live and work and make my own personal decisions."

I think there is some hope there. I would just conclude by saying that I do not share your analysis of the accord to some of the extremes. Perhaps you are using a little rhetoric here and there. I have done that myself from time to time. I do not think that is bad. I do not sense that the world will end if this accord ever does get finalized, but I think it may produce a significant change in the politics of Canada if it really does bring about some more democracy to the process.

In part, the reason I believe that is that I am sure the 11 men who went behind closed doors to strike this agreement felt they were doing their duty the way they ought to do it. I do not accuse any of them of bad intentions. I think it is not their fault, it is the fault of the rest of us, that it happened. When you sit down afterwards and analyse that process, it is quite an outrageous process, but I believe they went there with good intentions. I believe it is our job to assess what are the ramifications of this agreement that they struck, and our job to make sure that this kind of process does not happen again.

1640

**Ms. Coyne:** You made a number of points. First of all, I agree with you the world will not end, but Canada is going to end. I also agree with you that they went in with good intentions, but they were completely out of sync with the Canadian people and they had not realized how things had changed since 1982.

This brings me to your point about strong federal government. My point constantly was strong, national leadership too. I am not in any sense implying heavy-handed centralism that some people keep talking about. "Oh, you want to do everything instead of the provinces." When I talk about national programs, I am certainly

prepared to look at provincial delivery. It is the idea of the federal government being able to at least knock provincial heads together or say, "Hey, this is something everyone should benefit from." It is the political dynamics in the accord that are going to prevent that, that I am really concerned about, and I am surprised you do not share that. I am even more surprised that your federal leader does not support that. As I say to my students, he is broadly bent on this issue.

Interjection.

**Ms. Coyne:** That is right. In terms of the effect of the charter, what people have not realized—as I say, the ministers are out of sync with the people—is that it is having a nationalizing impact and that includes people in Quebec, because it has given us rights and it is also, with the broad equality rights, it is appealing to nonterritorial identities, i.e., we are not necessarily living Ontario; I am a woman, or I belong to a specific ethnic group, or I have shared concerns if I am a disabled person.

It is incredible the networks that have built up across Canada just since 1982 and just before that. I am aware of that in terms of my involvement with the Canadian coalition. That includes into Quebec, child care issues, and I will not go through the examples I was giving. If you go in and ask environmentalists, yes, they will agree that we share concerns in environmental issues and we want a national government that is going to be able to say to Clifford Lincoln in Quebec, "You must do X, Y, Z in the St. Lawrence Seaway."

The first ministers went in and they really are out of sync. They are not aware that the Canadian population and the people have changed.

Going back to good intentions and going back to my point about national leadership, yes, they went in with good intentions, but now what it has done is it has just sparked and made evident what has been emerging over the last three or four years and now it is your role to try to say: "Yes, there has to be an outbreak of democracy and here are some suggestions of ways to do it. You guys have to go back to the bargaining table and listen to these people."

**Mr. Elliot:** I would like to thank you very much for a very dynamic, comprehensive view of the situation. Yesterday when we finished up, we had six representatives of the Jewish Congress of Toronto here and probably a bevy of the best legal minds available to argue this particular point. I think you singlehandedly have risen to a prominence to share the centre stage with them, because in my mind what you have done is you

have very clearly identified a very complex problem in all of its complexities that we have to address over a long interval of time.

As a person who by profession solves problems, I think we have to look at where we have come from, and the comment I would like to make there is the fact that very quickly we have got control of our own Constitution, we brought in a Charter of Rights and now we have a proposed Meech Lake accord in front of us that has been signed by 11 people on the understanding that it would be ratified by their 11 governments within three years of the signing date, which, being June 3, means everything has to be finished up, if the deal is to be kept, by June 2, 1990.

I agree with you that what is happening here in the three weeks we have been sitting so far has been an evolutionary process, too. Our thinking is evolving as we go in this particular exercise, and I think that is good, because I think it is a living example of what has to happen when you are building a Constitution on a continuous basis.

My question also relates to down the road. If we are going to continue as a country, when we sign agreements, we have to live up to those agreements. My question to you is, because we are the first legislative committee to start doing this kind of process, presuming we successfully negotiate an opening up, is there time to take things back and meet the commitments made to Quebec on June 3, 1987? We have got a little over two years.

**Ms. Coyne:** I certainly agree there is time. When you say "meet the commitments made to Quebec," of course, but what is equally important is—and Premier Peterson can do this and, hopefully, more effective people in Ottawa—to persuade Premier Bourassa to let us really have a debate also in Quebec and say: "Here are the concerns that are being raised in the course of select committee hearings"—hopefully in the other provinces in addition to Ontario. "What do you guys think? If you really do want to stay in Canada, could you hold hearings?"

I would also like to see the debate take place in Quebec and more effort be put in there. So when I say "meet the commitments made," I am presuming also goodwill on the part of Quebec, that it is realizing, as much as I hope Premier Peterson and all the other premiers are realizing, that it just cannot go ahead and do this and that those are not frozen commitments. It is certainly a commitment of goodwill that we definitely are into the next stage.

Do not forget that in 1981 and 1982 when we brought in the new Constitution it was not game over there right then. Negotiations did start right away again. Letters were exchanged and all this, but we just had a particular political situation with Lévesque and that was the way it had to be. I am presuming goodwill.

We have a Liberal federalist government in Quebec and it will also be reading your report with great interest; and especially if you write it in the sense of, "We did not really even address your special concerns in a special way and it is going to have this impact," then it will be interested too. We only held hearings just before the Langevin committee meeting, and in fact there were some changes made at the Langevin committee in response to those hearings, but those hearings were, as far as I could tell, mainly academics and people who seemed to have been immersed in the process up to that date.

On the other side of things, the nationalist side of things, the debate in Quebec really just has not taken place because it has taken place between the provincialists and the nationalists. I would presume that a process could get put in motion and I am not afraid of it. That is what I said here. We do not want to tell our children that the 11 men were just so worried that the accord was so fragile that it could not withstand debate, so we passed it. That cannot be and I refuse to let that be the outcome. I am hoping you guys will help assist the debate.

**Mr. Chairman:** Thank you very much. I think we have covered a wide range of territory and again I want to thank you for putting forward your presentation in that way. I think you did it as well in a challenging and provocative way.

As a number of people have said, and I think it bears repeating, we are all in this committee on a journey. I am not quite sure where we all began, but we are on a journey. I do not think we know where we are going to end up, but we have heard many things over the three weeks and we have a number of weeks to go. I think it is important to remember in things constitutional that time and discussion and the interplay of different ideas then create new ideas and perhaps new concepts and perhaps ways of moving that right now we are not aware of, but which will emerge as we go on.

It is difficult, certainly in the context within which this has been given to us and to others, to try to make clear that we do want to look at the accord critically and helpfully and try to come up with something that is sensible, reasonable and, hopefully, right. We are not there yet, but I think



we have to have these hearings. We are indebted that people who have great concerns and who perhaps have concerns about whether it is worth while coming forward, in fact do so.

In this way we can put on the public record the issues, some new approaches and some ways of handling some of these things so that when we sit down at some future point, in a month or two, to try to determine as a committee where we ought to go, we are also going to be mindful that—whoever is sitting up on the second floor at the east end; whether his name is David Peterson, Andy Brandt or Bob Rae—as a committee what we are bringing forward to the Legislature,

hopefully for its approval, is something that can then lead on to a next step, whatever that might be. This is not, and you are not suggesting this at all, an academic exercise that we are going through. This is real and there are some terribly critical issues.

We thank you for helping us today.

**Ms. Coyne:** Thank you.

**Mr. Chairman:** We stand adjourned until tomorrow morning in London, Ontario, at 10 o'clock.

The committee adjourned at 4:50 p.m.

#### ERRATUM

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Funston, Bernard, Head of Constitutional Law, Ministry of Intergovernmental Affairs

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 Breau, Michael J. (Oshawa NDP)  
 Cordiano, Joseph (Lawrence L)  
 Elliot, R. Walter (Halton North L)  
 Eves, Ernie L. (Parry Sound PC)  
 Fawcett, Joan M. (Northumberland L)  
 Harris, Michael D. (Nipissing PC)  
 Morin, Gilles E. (Carleton East L)  
 Offer, Steven (Mississauga North L)

**Substitution:**

Sterling, Norman W. (Carleton PC) for Mr. Harris

**Clerk:** Deller, Deborah

**Staff:**

Bedford, David, Research Officer, Legislative Research Service

**Witnesses:**

**From Alliance Québec:**

Orr, Royal, President  
 Williams, Russell, Executive Director

**Individual Presentation:**

Pepall, John T.

**From the Legislative Assembly of the Yukon:**

McLachlan, James, Interim Leader of the Liberal Party; MLA for Faro

**Individual Presentation:**

Coyne, Deborah, Assistant Professor, Faculty of Law, University of Toronto







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## Official Report of Debates

### Legislative Assembly of Ontario

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord



**First Session, 34th Parliament**  
Thursday, February 25, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Thursday, February 25, 1988

The committee met at 10:02 a.m. in Carleton Hall, Holiday Inn City Centre, London, Ontario.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen, and welcome to today's hearings, which are taking place in London. This is the first time the committee has been outside of Toronto. We are pleased to be here.

I wonder if I might call upon Marietta Roberts, the member for Elgin, to say a few words.

**Miss Roberts:** Thank you, Mr. Chairman. I would like to welcome you and members of the select committee on constitutional reform here to southwestern Ontario. I am pleased that this is our first trip outside of Toronto. I am sure we will have many interesting presentations today. I am looking forward to showing you what you would like to see in southwestern Ontario if we have any particular time.

Welcome again. I am sorry the Premier (Mr. Peterson) is not here to shake your hands.

**Mr. Breaugh:** What is his name again?

**Miss Roberts:** I will get his name.

**Mr. Chairman:** I wonder if I might then call upon Dennis Hudecki from the University of Western Ontario to come forward as our first witness.

Professor Hudecki, we appreciate your coming here today. As you may be aware, our procedures are fairly informal. If you would like to make your presentation, we will follow that up with questions from members of the committee.

**Dr. Hudecki:** That is fine.

**Mr. Chairman:** Please go ahead.

DENNIS HUDECKI

**Dr. Hudecki:** First, I want to express my appreciation to the government for the very existence of this committee. You have a very important task. I have only seen little bits of you on TV and I think you are doing a good job. I have seen you on the Ontario station. I find that your response is sensitive and intelligent; so I wish you well. I also appreciate your coming to London, because there is no way I would have been able to get to Toronto. I welcome you to our city.

In this submission, I will put forward and defend three theses about the Meech Lake accord. I submit that if even one of these is true—and I think all three are—then the Meech Lake accord should not be ratified by the Ontario government. The three theses I want to defend are that the Meech Lake accord betrays Canada's highest values; that the accord destroys Canada's identity as a multicultural, bilingual country; and that the accord sets into the Constitution structures that are divisive and destructive of Canada's nationhood.

Before I defend these theses, let me say that it is undoubtedly a great thing to have Quebec in on a national accord and that any deal at all was struck is a hopeful sign; yet I suggest that this particular deal should be rejected since the price for Quebec's membership in it is too high. The Meech Lake accord, I am arguing, is analogous to a family that so much wants one of its members to return home that it is willing to compromise its ethical and religious values and the basic rules concerning respect for other people in the family. This family would be making a terrible mistake if it were to betray itself in this way. The family, I would say, would have lost its way and set into motion a demoralizing process such that it would end up worse off than before.

The Meech Lake accord, I argue, in its enthusiasm to bring Quebec on board, likewise loses sight of what is most important to Canada. The accord then is so destructive of what is important to Canada that the Ontario government should reject it.

Let me briefly defend each of my three theses. The first is that the Meech Lake accord betrays Canada's highest values, which consist in Canada's commitment to human rights—those rights, in particular, that are expressed in the 1982 Charter of Rights and Freedoms. Furthermore, the idea of human rights is not replaced by some other high ideal to which Canada will be committed. If Canada stands for anything, as I think it now does, it is that beneath the diversity of languages, cultures and regions, people are first of all to be considered as equals, just because they are human, and that certain fundamental rights and privileges are theirs just by virtue of their humanity.



Examples of such rights are the right to life, liberty and security of the person, the right to free speech and opinion, the right to assemble and the right to equal opportunity regardless of race, colour, creed or sex. This political philosophy might be called classical liberalism. It has roots going back to John Stuart Mill and John Locke, and even further back to Aquinas, the Bible and Aristotle. The very best in most humane countries in the world have embraced this liberal tradition and have made human rights their cornerstone. They have proudly held up this idea to the world, claiming that every human being in the world has human rights and that the countries which most deserve our respect and friendship are those countries which recognize these rights.

Classic liberalism is a successful political philosophy intellectually, morally and practically. It works, it endures and countries that have embraced this philosophy have not only survived but flourished. Granted, this framework has built-in difficulties, such as, for example, determining what to do when two rights clash with each other. Furthermore, this philosophy is extremely difficult to apply. It seems to require from governments not only a full-time effort, but a degree of character and enlightenment, elements that are not always present in government. Yet in the main, it has been the most successful political philosophy in history.

The Meech Lake accord unforgivingly betrays Canada's commitment to this tradition. Clause 2(1)(b), subsection 2(4) and section 16 of the would-be act tell the story. Clause 2(1)(b) says that Quebec, without qualification, constitutes a distinct society. It does not say that while Quebec is a distinct society, like all the other provinces, it is required to protect the human rights of its citizens; nor does it intend to say this, as section 16 and subsection 2(4) make clear.

Section 16 says that Quebec's being distinct does not affect sections of former charters dealing with multicultural and aboriginal rights. Subsection 2(4) says Quebec's distinctiveness does not take away any of the powers of the governments of Canada. It could have said that Quebec's distinctiveness must not affect Canada's Charter of Rights as a whole, but it did not say this. Applying the legal rule, *inclusio unius est exclusio alterius*, as well as common sense, section 16 and subsection 2(4) imply that all the other rights and freedoms not mentioned are affected by the obligation to promote Quebec's distinctiveness.

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The very concept of human rights, however, precludes distinctive interpretations, including distinctions based on territory. To say that human rights must be interpreted according to the borders within which one lives is just a trick of language. The concept of human rights by definition transcends borders. Either everyone has them or does not.

If the Meech Lake accord is accepted, Canada will sink morally to the level of many countries in the Third World and behind the Iron Curtain that pay only lipservice to human rights. Under the accord, for example, freedom of speech is limited by the recognition that Quebec is a distinct society. A government, under Meech Lake, could restrict even a submission like this on the grounds that it is doing so to preserve Quebec's distinct society. Women's equality as well as all other rights are likewise limited by the duty to promote Quebec's distinctiveness.

But even more disturbing than this is the implication in section 2 of Meech Lake that human rights are no longer a fundamental characteristic of Canada, but now just one consideration among many in our Constitution, and that they have to compete with the countless other provisions in our Constitution. They will no longer be at the top of the hierarchy of values in Canada. I think it is fair to say a country that does not place human rights at the top of its hierarchy of values has no human rights at all. That is the way the concept of human rights works.

In short, the Meech Lake accord betrays Canada's commitment to the values in the classical liberal human-rights theory. The Meech Lake accord for this reason alone should be rejected by the Ontario government. I appeal to Ontario to stand up for Canada's integrity.

My second thesis is that the Meech Lake accord destroys Canada's identity as a bilingual, multicultural country. In Meech Lake, multicultural and aboriginal rights are protected to some extent by section 16. If section 2 clearly does not recognize the existence of many cultures and aboriginal peoples as a fundamental characteristic of Canada, therefore, under the Meech Lake accord, the existence of many cultures, including the existence of the aboriginal peoples, is no longer a part of the essence of Canada's image.

The notion of Canada as a bilingual country fares even worse. Most affected is the English minority in Quebec, which stands to lose its rights, not only because language rights along with all other human rights are no longer a fundamental characteristic of Canada, but in

particular because of Quebec's special duty to promote its distinctiveness from the rest of Canada. Furthermore, that both French-speaking and English-speaking citizens have minority language rights is no longer a fundamental characteristic of Canada.

What is fundamental to Canada now, under the Meech Lake accord, is only an obligation by governments to preserve the existence of linguistic minorities, not an obligation to protect and promote their rights. Under Meech Lake, the idea of Canada being a thoroughly integrated multicultural, bilingual country is destroyed. In its place, Canada becomes fundamentally characterized as two distinct societies, each with a territorial base and each possessing a linguistic minority group.

As Professor Stephen Scott, a well-known constitutional expert, puts it, the accord could have described Quebec as being an integral, though distinctive, part of Canada, but the accord does not describe Quebec in this way. Instead, under Meech Lake, Canada consists of two distinct societies separated by borders and of two language groups not separated by borders but whose minority rights are not a fundamental characteristic of Canada.

The Meech Lake accord sadly destroys what is a noble, coherent and widely accepted vision of Canada. Under the vision of Canada as a multicultural, bilingual country, Canada's rich diversity of cultures is considered as one of its defining characteristics. Likewise, this vision of Canada as a bilingual nation has built into it the goal of making all of Canada, from sea to sea, a place where either a French-speaking or English-speaking Canadian could feel at home. Under this vision of Canada as a multicultural, bilingual Canada, harmony among diversity is the built-in goal.

The Premier should reject the Meech Lake accord if he believes that Canada's true identity consists in its being a multicultural, bilingual country unified by a common Charter of Rights for all. By signing the accord, he will be destroying this concept and replacing it with a concept of Canada that values distinctiveness over harmony and exclusion over inclusion.

My third and final thesis is that the Meech Lake accord sets into the Constitution structures that are divisive and destructive of Canada's nationhood. The Meech Lake accord will split Canada apart in two ways: first, by its pushing Quebec into a *de facto*, if not real, separation from the rest of Canada; and second, by the destructive and weakening effects brought about

by the radical decentralization that is permanently entrenched in the Constitution.

The Meech Lake accord will drive Quebec into isolation and separation from the rest of Canada due to its proclamation that Quebec's prime obligation is to preserve and promote its distinctiveness as a society. The accord's logic, so to speak, pulls Quebec towards self-involvement and away from the affairs of Canada as a whole.

For one thing, there will be little incentive after Meech Lake for a Quebecer with leadership ability to involve herself or himself with federal politics, for Quebec's policies on such things as language, social policy, communications and economic policy will now mostly be made in Quebec as a result of its distinctive status.

Furthermore, federal members of Parliament from Quebec will find themselves in a constant conflict of interest. Should they focus on policy for the rest of Canada, thus ignoring their distinctive society, or should they focus on their own society, thus ignoring the rest of Canada? Thus, under Meech Lake, there will be little incentive for Quebec's leaders to become involved with Canada-wide affairs.

Furthermore, as a distinct society, Quebec will surely head in the direction of building a political and legal infrastructure that is worthy of a distinct society. For example, the courts may decide that Quebec is allowed to make its own foreign policy with regard to those aspects under its control. For Quebec to be able to conduct foreign affairs will require a tremendous amount of human and political resources and energy. Under Meech Lake, the main focus of power for Quebecers will be in Quebec City, not in Ottawa. As time goes on, Quebec will become more and more isolated from national affairs.

Second, the Meech Lake accord will set into motion similar kinds of forces that drove the separatist movements in Quebec in the 1960s and 1970s. Once again, Quebecers will begin to feel like foreigners when they are outside of their special distinct society. The federal government will be like a foreign government to them. Unilingualism may very well become the law of the land, even if the Supreme Court outlaws it, for now Quebec will be able to politically justify the use of the "notwithstanding" clause by citing subsection 2(b) of the accord, which obligates it to promote its distinctiveness. Thus, English will become more and more like a foreign language for Quebecers.

Furthermore, every time the Supreme Court or the federal government restricts one of Quebec's



economic, social or foreign policies, Quebecers will feel under the thumb of a foreign, alien government. As the years go by, separatism will appear to Quebec as an even more attractive option than it appeared in 1976, for after Meech Lake has been in effect for a while Quebec will have already achieved so much autonomy that total separation will not seem like such a risky leap into the dark as it did in 1976 but rather as the next logical step.

The second way that the Meech Lake accord will be destructive to Canada's nationhood consists in the economic philosophy that is built into the spending power amendment. That philosophy contains a definite bias against the creation of new national shared-cost programs; yet such programs, such as Canada's medicare program, have in the past proved to be among Canada's finest and most precious achievements. Furthermore, such programs are a kind of glue that binds Canadians together.

There is also a bias against central economic planning in the accord. Perhaps many of the premiers who signed the accord do not believe that federal economic planning is what Canada needs at the moment, and I respect their views. In Meech Lake, however, the premiers have entrenched their bias towards a conservative, market-driven economy permanently into the Constitution. I am persuaded by the many economists who have argued that such entrenchment guts Canada of its economic backbone, leaving us highly vulnerable to sometimes irrational economic forces.

These economists argue that Canada, being a sparsely populated and highly fragmented society, needs at times strong economic leadership from the federal government to survive and compete with countries much more powerful than us. Furthermore, economic excellence may at times require strong economic leadership in partnership with the private sector on a Canada-wide level, yet the kind of flexibility that federal economic leadership requires has been permanently diminished by Meech Lake. Furthermore, under Meech Lake, Canada's economic policies will more and more tend towards being no more than the sum of the 10 provinces' particular economic policies; yet the provinces often disagree with each other, leaving Canada at the mercy of conflicting priorities. This is a recipe for weakness and mediocrity.

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Because of the accord's permanent decentralizing logic, Canada's national sense of itself will diminish year after year. Given the unanimity

requirement of the amending formula, there is no guarantee at all that Canada could stop the flow of economic and political power away from the federal government. In such a demoralized state, with less and less economic and political power, the federal government may not be able to maintain anything like a Canadian spirit. Under such circumstances, even English Canada will be vulnerable to a breakup caused by the divisions among the provinces.

Such then are the destructive forces the Meech Lake accord will set into effect. In conclusion, the Meech Lake accord should be rejected because it betrays Canada's highest values, destroys Canada's identity as a bilingual, multi-cultural country and sets into the Constitution political and economic forces that are divisive and destructive to Canada's nationhood. I appeal to the intelligence and conscience of the Ontario government to exercise the power it has to reject the Meech Lake accord and thereby stand up for Canada.

**Mr. Chairman:** Thank you very much. That was a very clear presentation, one that I think sets out your themes succinctly and also with some feeling. We appreciate that. I will now move to questions and we will start with Miss Roberts.

**Miss Roberts:** Thank you very much, Professor Hudecki. It was very helpful. I cannot believe this is the end of our third week and there is even a new approach.

The one thing you mentioned that startled me was the problem the people in Quebec might be having with federal politics and the concern you have with respect to that. Is it completely based on your premise that the divisiveness that is built into the accord will promote this?

**Dr. Hudecki:** That is right.

**Miss Roberts:** Can you outline in more detail what you consider to be the particular divisiveness? Is it everything in the accord? I think you mentioned just about every section, although you did not say anything about the Senate and the judges. Does that also promote this?

**Dr. Hudecki:** That promotes the flow of power away from the federal government, but I did not stress that because I have problems with the status quo. I am not inclined to defend the status quo, the way in which just the Prime Minister appoints the Senate and the Supreme Court. That is also problematic.

The point I wanted to make about Quebec politics was that there is a conflict of interest. Suppose somebody was a minister in the federal cabinet. Would even English Canadians be that

interested in that person, knowing he had a different obligation to the province of Quebec than to the rest of Canada? The person would always have his eyes going in opposite directions. Suppose there is a Minister of Communications. It seems to me Quebec is almost always going to have a very different policy from the federal policy because its duty is to promote its distinctiveness. He is going to have to play two roles all the time and may not be completely trusted by either group because there are different constituencies. You would wonder what the goal is in being in politics.

**Miss Roberts:** You basically think it is going to be a very great social change in the way the people in Quebec might view themselves.

**Dr. Hudecki:** That is right.

**Miss Roberts:** Or be allowed to view themselves.

**Dr. Hudecki:** You are understanding what I said perfectly.

**Miss Roberts:** One thing we are considering is the process, how we got here to begin with; and then what is going to happen whether Meech Lake passes or not. I assume you agree that the Constitution Act, 1982, is not perfect.

**Dr. Hudecki:** That is right.

**Miss Roberts:** There is going to have to be an amendment or some changes somewhere down the road; something will have to be done. How would you suggest the process be changed to reflect the concerns we have been hearing? Have you thought about that?

**Dr. Hudecki:** Yes. I do not have any hope for this Meech Lake accord as it is laid out since section 2 twists the shape of Canada into a weird one. It is just structurally so awful that I do not see how it could be fixed up. Maybe if you put the Charter of Rights and a whole bunch of things into the first section and really define Canada properly, there might be hope for it. All the amendments, all six of them, so hang together that it is a clear intention by the premiers to go in one way, and I am just against it. I think it is disastrous. I do not have that much hope for it other than to say no and start over again.

If this is what Premier Bourassa is demanding, if I were the federal government I would have to say—it is just like with a family: if a kid says, "I will come home but I am going to make my own rules," the parents are going to say: "No, I am sorry. Then you will have to stay out as a runaway child." That is really that.

You are right that the 1982 accord did not get Quebec in and Canada is in trouble. But this is an

overreaction to Canada's trouble, so I would just do nothing right now and see what happens. There is going to be more chaos caused by this, by Ontario and the other provinces accepting it, than if they said no. They could appeal to Canada's moral integrity on human rights and say no and it would not be seen by Quebec as a slap in the face.

**Miss Roberts:** But I am talking about the distinct process. We have heard much testimony that indicates that 11 men should not be the only people who see what is going on in the process. Do you have any help for us with respect to that particular process? Do we send 11 men back into the same room and say, "Go back at it"? I am afraid it might be the same 11 if we do it in a hurry. How are we going to deal with that?

**Dr. Hudecki:** I do not know the answer. I would love to read what your report says. That is how the 1982 accord ended up being written and that process is flawed. It just seems all wrong. I do not know; I am sorry.

**Miss Roberts:** But we should still be looking for something to change that.

**Dr. Hudecki:** That is right; just do not say yes to something that compromises Canada's integrity.

**Mr. Breaugh:** One of the difficulties many of us have with this is that, unlike previous attempts to alter the Constitution of Canada, this one is particularly mired in a lot of secrecy. We do not even have any second-hand reports of what were the intentions of these people, what were the tradeoffs that were made and what was the general direction in which people tried to take this agreement. Part of the difficulty in trying to analyse what the ramifications of this are is that we do not have any background and it is tough to put it into a context. I think the process that got us to this point is one that is going to cause us immense pain after this.

We have gone through the exact provisions in a meticulous way with a number of groups now. My reading of it would say that if we could determine, for example, that the Charter of Rights has not been infringed by this agreement, we would alleviate a great many concerns by a number of people in the country. It is not clear, to be charitable, whether that is true or not and it will not be clear until a court decides.

I, for one, do not share the great pessimism that you do. I have a tendency to think that no matter how badly these 11 people screwed it up, there are a few million other Canadians who will unscrew it for them. I would have to take an



almost draconian view of Quebec's intentions to get to the point you are at. I admit that is possible, but I do not think it is likely.

The reason I am being a little apprehensive is that I would really like to know what was said by each of the premiers and by the Prime Minister as they arrived at this accord. That would make an immense amount of difference in how I view the document itself.

The danger I see in this process is that if you are left to struggle with the interpretation of the exact words, whether something is in the interpretative section or in a rights section, if you are left to struggle with the words themselves, the best you can do is second-guess a Supreme Court decision before it happens. The truth is that no one knows what is going to happen from that.

In your opinion, would it alter your vision of it if we were able to establish that the Charter of Rights had not been infringed by this agreement?

**1030**

**Dr. Hudecki:** Only to some extent. Just to go back a little to what you said, I do not see how the most important issue is the premiers' intentions or what went on in the back room, because I think what is the most important is what is written. In 25 years, that is what the Supreme Court will be looking at.

I cannot imagine a court case contesting the whole Charter of Rights. What would you say to this: what if the Supreme Court said, "No, they are not affected, but we still have a Constitution where they are not considered to be a fundamental characteristic of Canada"? I would still be afraid that in 20 years the next Supreme Court, when it changes, is going to bring them down to a secondary status. Where they really are in the Constitution they are of secondary status.

What if this Supreme Court, so used to our past way of looking at Canada, just sort of overlooked the words? The words there are pretty devastating. You seem to be happy with one court decision that would contradict what I think are the words. You say, "That would satisfy me," but I am still worried about the words in the Constitution.

I would ask you one more question. What about the symbolic effect of a Constitution? Does it not lay out Canada's priorities? Should it not do it and not some court case? This lays out Canada's priorities, and everything I have ever thought of as being great about Canada is down the tubes by this Constitution. It is divisive. It builds walls; it excludes.

Are you not worried about the spirit of the Constitution?

**Mr. Breaugh:** Let me tell you the problem I have and I think it is one that you are having too. It is difficult to view this accord as part of Canada's Constitution, which is precisely what it is. The Constitution was not the old one thrown out and a new one brought in. This is an amendment to an existing document. We are struggling with how it fits and that is kind of the critical factor here.

If, for example, I am assured that the Charter of Rights stands clear, unimpacted by this agreement, then I view the agreement in a different light totally than many people would. For example, the basic concern of a number of the witnesses who came before the committee is that they have lost ground in this round of negotiations and to what extent we will not know until the Supreme Court makes probably several decisions over a number of years. It is really tough to estimate the damage that might have happened by this agreement. It may be nothing. We do not know that yet.

For example, in looking at the concept of a distinct society, it may be that 20 years from now we look at this and say, "It had virtually no practical impact on anyone in Canada, but it made people in Quebec feel better." There are those who hold that point of view. If the courts make that stand up, we look at this in a totally different light than, for example, you did this morning.

The reason I need to know the intentions are important for a number of people in Canada, particularly in the north, the Yukon and the Northwest Territories. They are in a quandary as to just why they were so steadfastly excluded from even any discussion of this agreement. If that were done essentially because the premiers could not figure out a way to work them into the process and it was simply that, I do not feel that badly about it. We can find a way to work them into the process frankly.

**Dr. Hudecki:** How?

**Mr. Breaugh:** Very simply. For example, it could be as simple as this: the Northwest Territories and the Yukon have never had a vote on constitutional matters, they have always had a voice. Their argument basically is they have lost their status at the bargaining table. It could be as simple as the Prime Minister of Canada, the next time they knock on the door and say, "Can we come in to hear what you are saying and discuss with you what you are saying?" if he says yes the next time instead of no as he did at Meech Lake, their problems gone in this regard and their status essentially re-established.

What changes, of course, is the process whereby other provinces are brought in. But in testimony before this committee, both of them frankly admit they are not talking about provincial status this week or next week or in the foreseeable future, so you have some time to work out an agreement whereby they would be brought in.

**Dr. Hudecki:** I am more pessimistic about what happens in 30 or 40 years when they do want to become provinces. What guarantee is there and why even take the chance?

**Mr. Breagh:** I would say they would have the exact same guarantee that Ontario had when it became a province. There was no guarantee of provincehood for a place called Ontario. There was no place called Ontario. It had a population and a geography that is not dissimilar from the northern extremities of the country now. As a matter of fact, at that time it was considered to be the northern extremity of Canada.

There are theoretical problems that I have with this. I think what most of us are trying to do is get some kind of a grasp on the real practical problems that are posed by this. Most of us are practising politicians. We are not bedevilled by words. We know that no matter what an agreement might say, if 11 people with good intentions sit down next week and say, "We did not mean to create this problem, but there is a problem. Let us rewrite the law," they can do that. We know that if the premiers and the Prime Minister are convinced by the work of this committee that a mistake was made, they can, in fact, sit down and rewrite it. That is possible and it has happened.

I think part of our job is to determine what is a real, practical difficulty with this agreement, where the difficulties are, and to make the case that this is worthy of the first ministers of the country reconsidering. That is what we have to do. I do not think we can afford to engage in the theoretical. That is your job. That is not my job. My job is to establish where there is a real, practical problem that has to be fixed; and if it is bad enough and it is clear enough that we know how to fix it.

**Dr. Hudecki:** I am just asking now, I am not making a point. Do you think the sections 2 and 16 together constitute a mistake regarding the status of the Charter of Rights and Freedoms? In other words it said only the things regarding multicultural and aboriginal peoples are not affected and did not mention any of the other ones. I am just asking the whole committee, do you think that constitutes a mistake?

**Mr. Breagh:** From my point of view, it is not a serious error if we establish the primacy of the Charter of Rights. If we are unable to do that in some form, then I think the potential is certainly there for very serious problems to come in the future. For me, as one person on the committee, if I am able in some fashion to establish that the charter is supreme over anything that is in this agreement, my problems diminish substantively.

If I am unable to do that, then the questions that have been raised by a number of groups over those two sections and other sections become much more real and I for one would be unwilling to let that go to some kind of a great crap shoot in the Supreme Court. I want some better assurance than I now have that what Mulroney has said and what many of the premiers have said is true, that the charter remains supreme to anything that is in this accord. If we can establish that, then I look at it in a whole different light.

**Mr. Elliot:** This is really a supplementary, as things have evolved, to what we have just been discussing. We are just finishing up the third week of hearings now and in the first week, essentially, we had presented to us a lot of very expert advice with respect to the detail of the wording and that kind of thing in the accord that we are perusing. We have now had two weeks of hearings with people such as yourself coming before us with very divergent views with respect to their interpretation of the thing.

In what we are trying to do, I think your type of presentation is very beneficial because in my mind, relative to some things we heard yesterday, it gives us a real choice with respect to what we may or may not do. You clearly say that the accord should be rejected. The other two alternatives are that we accept it or it be amended.

What is coming through loud and clear to us is that there is a realization by a lot of people now that we have a Constitution of our own, we have a charter of our own, this is an attempt to amend the Constitution and it is very important that all of the three documents be read together in the realization that our Supreme Court seems to be going to have a greater role in interpreting the wording and that kind of thing.

The kind of thing that we were presented with yesterday by the Alliance Québec, the English-speaking Quebecers, is sort of opposite to the kind of intent that you are expressing today, because they very definitely see a lot of merit in the accord from their point of view and are very optimistic about the fact that they, within the borders of Quebec, can reconcile their differ-



ences with the French-speaking majority. So when someone like yourself presents the arguments that you just presented from a theoretical point of view and says, "Reject it and start over," this leaves me, as a committee member, in a real quandary.

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**Dr. Hudecki:** Are you saying that they think their English minority rights have been protected in Meech Lake?

**Mr. Elliot:** Not really that clearly. What they say is—

**Dr. Hudecki:** I find that just incredible. They probably got hit the hardest of anybody. I think rights in general, including language rights, as I said in my paper, are not there at all if they are not at the top; I think everyone sort of loses his rights, including language rights. But in Quebec there are two reasons why they lose them, because of the Quebec government's special obligation to promote its distinctiveness. So I find that incredible if somebody is saying, "We love this," and people defending English—

**Mr. Chairman:** I think theirs was a fairly long and involved brief, and we want to be careful, since they are not here, in attributing too much to them. But their point was that as English-speaking Quebecers they have problems with the accord but are seeking changes and amendments to it. This is all in Hansard; you might at some point want to look at it. I do not think anyone is suggesting he feels it is the greatest thing since sliced bread.

**Mr. Elliot:** That is the kind of comment I would have made, too. They never really said they loved the present accord, because there are some serious concerns with respect to it. But the flavour of the discussion, as I recall it, was a very optimistic, upbeat kind of approach to the whole problem with an idea that there could be a resolution there.

The one thing this committee seems to be accomplishing that has not been done is the fact that it is coming through very loud and clear that the kind of 11-person meeting that developed this accord is no longer satisfactory in Canada. If the consultation in advance of that kind of meeting does not take place from now on, I submit, the decisions made by such a meeting will not be adhered to by the people whom those premiers and the Prime Minister represent.

Now, what I would like you to do, if you would, is to sort of reconcile in my mind for me the difference between that upbeat, optimistic kind of evolutionary concept and yours, which is

to reject it completely and start over again, because I am having real difficulty with that.

**Dr. Hudecki:** Yes. Well, in fact, I am very sympathetic to everything you just said now. If I thought the premiers, or whatever the new process was, if I thought we could do it again, I could work with this. I would just want section 2 redone properly, because I find it is talking about fundamental characteristics of Canada and I care about how Canada is defined.

If we could work on that, I could be upbeat about Meech Lake. I guess I have just been hearing so many times that if even one comma is changed, then the thing is over. That is why I say you have to say no. But if someone said, "No, that is not true; it can be changed," then I would be happy. I would go to work on section 2.

**Mr. Eves:** To follow up Mr. Elliot's line of questioning, I believe that one of the recommendations the alliance made to us yesterday was that they were disturbed by the fact that in subsection 2(3) it says that the government of Quebec is "to preserve and promote," whereas in subsection 2(2) the government of Canada and other legislatures are only to preserve, and not to promote.

**Dr. Hudecki:** Right.

**Mr. Eves:** That was one problem they definitely had as an English minority in Quebec.

Along the lines of the questioning Mr. Breaugh had, you asked him a question about sections 2 and 16 read together. Quite frankly, most of the presentations we have heard before this committee deal, I would say, with those two sections read together and what does it really mean and is it clear or is it not clear? We have had constitutional experts on both sides. Some tell us it is clear; some tell us no, they think there is some ambiguity there and a court in the future might disturb some of the rights or freedoms outlined in the Charter of Rights and Freedoms and it could possibly be interpreted that way.

But I take it that what you are saying is that even if those problems could be resolved—if, say, section 16 were worded so that it left no doubt that every right and freedom granted under the charter had primacy or superseded the accord—would you be happy with that, or are you saying that you think section 2 is so greatly flawed that you almost want to rewrite it?

**Dr. Hudecki:** Yes. I would rather go the route of mentioning the charter in section 2 as a whole; I would prefer that. Your way would help. I would be happier if even in section 16 it said the whole Charter of Rights is not affected.

I guess we are probably coming to a close now, and Mr. Breugh said that we are politicians, and do not get too caught up in the hocus-pokus of words; try to figure out what is really happening. But I warn everybody to pay attention to words: Pay attention because they may last 50 years. I really think you should pay attention to the words and to the spirit of this. You see, just as a Canadian, do you not worry about the way this is defining Canada as two distinct societies based on territory? Does that not rub you the wrong way?

**Mr. Eves:** For my part, I certainly see the point the alliance made yesterday. The wording is definitely different in subsection 2(2) from subsection 2(3), and I think that creates a problem in itself.

**Mr. Chairman:** Professor Hudecki, I think you have done one thing today which has not happened before, and that is you have probably posed more questions back to us that we are grappling with and are going to have to reflect upon, and for that we thank you.

When we started this exercise, we were named to this committee late in the fall, but, as has been noted, our hearings began at the beginning of this month. There are a lot of questions that we had at that time. I suppose we thought perhaps by this point maybe we would have answered those. While we may have answered some of them, we have probably tripled or quadrupled other questions that are now sitting in front of us, and I think you have quite rightly put your finger on a number of them. By the end of this exercise, whenever we make our report some months hence, it is possible that our answers to those questions may be different, but I think you are quite right in insisting that we think about those. I think we do have to come up with answers to those in our own minds.

We thank you very much for taking the time to prepare your presentation and appear before us this morning. We are all indebted to you.

**Dr. Hudecki:** I feel it is mutual. I am indebted to you just for existing, and again for coming to London. Thank you for hearing me out.

**Mr. Chairman:** I will permit everyone 30 seconds to go to the end of the hall for a cup of coffee. As people are doing that, I would like to invite the representatives of the London Women Teachers' Association—the president, Carla Pieter-son, and the vice-president, Barbara Hoover—to come forward. Please feel free to get some coffee as well.

The committee recessed at 10:49 a.m.

1050

**Mr. Chairman:** We will begin again if everybody has a shot of caffeine, soda water or whatever.

May I, first, thank you very much for coming today. I know that you have been both an afternoon and a morning witness, and we thank you for being able to come this morning to fill a spot which became open. I will simply turn the microphone over to you to make your presentation, after which we will follow up with questions.

#### LONDON WOMEN TEACHERS' ASSOCIATION

**Ms. Pieter-son:** First, I would like to welcome you to London and thank you for coming. I thank you also for the opportunity to come and express our views.

I am this year's president of the London Women Teachers' Association and, as such, I represent the 900 women elementary teachers in the London public education system. We are the people who spend our days working and learning with kids and also communicating with parents. Our daily endeavours are, I feel, very important ones. It is our job to try to instil in kids a love of learning and a delight in discovering. It is our job to try to develop in children a sense of self-worth and at the same time teach basic skills. These endeavours keep us rather busy.

We are teachers and we are not constitutional experts. However, we did feel compelled to come to speak on the Meech Lake accord because as part of our Constitution, it is going to be the beams and the girders upon which our society is built. That, I think, makes it a very profound and a very important document.

First, I want to say that we are very committed to a united Canada and we are very pleased that Quebec is going to become a full partner in the constitutional process. However, there are sections of the accord that we feel are ambiguous and unclear. We feel that before the provisions of the accord become law these ambiguities need to be clarified.

I realize that there is a lot of concern about the accord in a lot of different areas. There are two in particular that we would like to address, namely, the equality rights for women and also the provinces' options to not participate in national shared-cost programs.

We feel very strongly that the equality rights of women that were won in 1982 are at risk. The Charter of Rights and Freedoms entrenches the rights of all Canadians. Clause 28 was added to



the charter to ensure that all rights be given equally to male and female persons. This clause was very specifically added to the charter to guarantee a legal basis for the protection of women's rights.

The accord expressly protects native and aboriginal concerns in clause 16; it does not mention women's rights. Prime Minister Mulroney has stated publicly that it was not his intention to override the charter in these matters. However, in the future the courts are going to be guided in their decisions by what is written and not written in the Constitution. Since some rights were definitely included and others not, the courts could well decide that the exclusion of women's rights was intentional. We have fought too long and hard for our rights to leave them up to somebody's interpretation of what somebody in 1987 might have intended but did not remember to write down.

These ambiguities concerning women's rights have to be clarified. Perhaps a simple way of doing that is simply to delete section 16 from the accord altogether and replace it with a provision that states that the charter prevails over the accord in these matters.

Second, it is our understanding that the provisions of the Meech Lake accord allow provincial governments to opt out or to choose not to participate in national shared-cost programs. Each province has the right to not join in such programs if it has schemes that are compatible with the national objectives. The province is also then entitled to reasonable compensation from the federal government.

The vagueness of these terms, I feel, could lead to endless wranglings as governments try to define what is compatible, what are national objectives and what is reasonable compensation. As they sit there and argue and disagree, the programs could be shelved indefinitely.

We are also concerned about opting out because we feel it puts into jeopardy the fundamental principles on which Canadian society is built, namely, the universality and accessibility of social programs. Allowing provinces to opt out of new initiatives can have a profound effect, particularly on women and, of course, children. Schemes such as a national child care policy, maintenance orders and a national dental plan must be universal and must be comprehensive. Amendments to the Meech Lake accord need to be made so the federal government is able to maintain equal services to all its citizens.

As I have said, we are committed to a united Canada, based on principles of equality and equal access for all citizens. We feel it is imperative that the accord reaffirm these principles very precisely and very clearly, and we feel the amendments need to be made before the charter becomes part of the constitutional framework.

**Mr. Chairman:** Thank you very much. It was very clear and specific. I think, as you are undoubtedly aware, a number of groups and organizations—indeed, Mr. Breaugh mentioned it earlier—have addressed those points, particularly the equality ones, but the repetition does not hurt.

**Ms. Pieterston:** We find in schools that helps too.

**Mr. Chairman:** That is right. We will turn to questions from Mr. Eves, Mr. Cordiano and Mr. Breaugh.

**Mr. Eves:** The chairman is quite right; a number of groups have raised these very important issues with the committee. You have heard the question that I asked of the previous witness. I quite concur that section 16 needs to be clarified. If that is what everybody means, why does everybody not say so in some very simple, all-encompassing language? Otherwise, I think it is at least possible that a court could read something into the fact that two groups are mentioned in section 16 but nobody else's rights are mentioned. I fully understand and concur with your position on that matter.

With respect to the opting-out provisions, however, we have been told, by at least one witness that I can recall previously in hearings, that the original wording for this section was not "national objectives," but "national standards," and was changed to objectives at the insistence of one or more of the provinces. Would you be happier, shall I say, if the word "standards" was to be used in that section as opposed to "objectives"? At least, that would be some method of the federal government demanding something of each of the provinces.

**Ms. Pieterston:** Yes, I would be happier with the word "standards."

**Mr. Eves:** But you are still uncomfortable with the opting-out process?

**Ms. Pieterston:** Yes. I feel, just as Dr. Hudecki said, one of the marvellous things about Canada is that there is this universality; we are a very diverse nation, but there are certain things that every Canadian can expect. Our social programs are our fundamental in that. I feel it is

very important that we keep that. That has to be part of the basis of our society, that social programs are equally accessed by everyone. "Standards" would help instead of "objectives."

**Mr. Eves:** The argument that is made by many people on the other side of that coin is that provincial governments are more aware of the needs of their residents and although there is a national program or standards in place, perhaps they need to be tailor-made to suit the residents of certain individual provinces.

What is your comment on that?

**Ms. Pieterston:** You can tailor-make something, but if you tailor-make something too much, you have destroyed the essence of it. It is the same thing—I have to always bring it back to a school system—you can have 65 different schools all committed to the education of children but you need some sort of central philosophy and central focus from which they all have to work; so, yes, provinces do have to tailor-make their programs but the thrust has to come from a national focus.

**Mr. Eves:** Thank you.

1100

**Mr. Cordiano:** I too would like to thank you for coming before our committee. It takes a lot of effort for any group to come before a committee of the Legislature to talk about matters that pertain to the Constitution. They are somewhat esoteric, and most people have not really delved into the subject matter, although we would like to promote that. In fact, I am one of those people who believes that the more people there are who know about their Constitution, the better off we will be as Canadians and as a country, although I do not know how realistically we can accomplish that. It does take a number of resources to be able to come before committees, and yours is one of the groups that can do that. Perhaps there are others that cannot.

I want to get into the subject that you have dealt with and continue along the lines that my colleague Mr. Eves was speaking to you on, and that is with respect to shared-cost programs, spending provisions in the Constitution.

The only point I want to make is about the difficulty I am having with this section, as a member looking at it. In one paragraph, you say, "The vagueness in these provisions might lead to endless delays as governments haggle over the definitions of 'compatible,' 'national objectives' and 'reasonable compensation.'" You go on to say that if the federal and provincial governments are haggling over the definition and meaning of

certain phrases, such as "national objectives," then programs could be put in jeopardy and on the shelf.

I look at the whole debate over extra billing and I think we could use that as something of an example in this direction, because you had a situation where you could describe the ban on extra billing, or a national health care program that did not include extra billing, as a national objective. Certainly, the federal government made that claim. I do not see how that would be too difficult to arrive at in terms of clear and precise language, where you would point out that a national objective is to have a program, such as we do in Canada, that does not include extra billing; that is, it is universal, accessible and affordable.

The same could be said for a child care program across the country. That is a national objective. We want to have a national child care program, which is universal, accessible and affordable. If there is the government will to do it, then certainly it will be accomplished. I do not care if the word is "objectives" or "standards," but I think if the will is there and if the government is determined to point out what the demands of the program are and what the needs to be met are, and these are the objectives which will reach right across the land, then certainly that can be accomplished.

**Ms. Pieterston:** Suppose the federal government says: "We believe very strongly in a national child care policy. We would like all provinces to implement one, and that is the national objective."

**Mr. Cordiano:** Then you have a feeble government. I mean that is the program that the government would put forward.

I am not trying to answer this for you, because you would have to put that question to the federal government in place now, but if there is no will to have a national program that has certain objectives, then we could have different standards for different things; but it is difficult to tailor those to national standards, what the needs are in northern Ontario and what the needs are in various regions of the country. If you have national objectives, then you have to meet certain goals. That is what programs right across the country should be doing. That is what I think we have in terms of our medicare program.

**Ms. Pieterston:** I agree with you in terms of medicare. Medicare is already in and medicare is great. I think it is wonderful, but there is no guaranteeing that the federal government is going to say: "We want a child care program."



These are the specifications we want and we demand that every province meet those," Probably you would get a lot less flak if you say, "We would just like a national child care policy." Again, it is leaving it very vague. It is very fuzzy. Objectives can be as specific or as unspecific as you wish them to be. Standards, on the other hand, spell out much more clearly.

**Mr. Cordiano:** It is your opinion that the federal government—let us put it this way—is the one government that can accomplish this on its own. If the federal government is not the preserve of those kinds of objectives—I do not want to use that term—or national goals, then we are not going to have that kind of program.

**Ms. Pieterston:** No. I think there are many provincial programs that are excellent. We in Ontario could have a superb program in child care, but I think the people in Newfoundland should also have a superb program in child care. I think we need some sort of national focus or we are going to end up with little pockets everywhere; some pockets that are very good and very progressive and other pockets, due to financial constraints and isolation, that are not. I am not saying that everything needs to come from the federal government. I think we are a very decentralized country, but in terms of social programs, yes, there needs to be a national focus.

**Mr. Cordiano:** You do not believe that the section which deals with national objectives will be enough to set a national focus?

**Ms. Pieterston:** No. Again, it is very vague. We can write objectives till the cows come home.

**Mr. Cordiano:** Yes.

**Mr. Breagh:** I want to kind of agree with you on one thing and disagree with you on another. My concerns around the Charter of Rights and provisions can be met in a number of ways. We can refer the matter to the Supreme Court of Canada and get a court decision. That is one route. We can amend this document and see if we can put the words together in a better order. We can simply delete certain sections of this provision and let the charter stand.

As a committee, we have at least three options and probably more. I really do not care which one gets used so long as the supremacy of the charter, and particularly the equality rights sections, are clearly supreme and unimpacted by this accord. I take it you take much the same position?

**Ms. Pieterston:** Yes.

**Mr. Breagh:** Whatever vehicle is used, as long as we clearly establish the supremacy of the

Charter of Rights, we do not care about Meech Lake in that regard.

The other area where I would tend to disagree a bit is on the shared-cost programs and mostly because that is the way we do it in Canada. There is hardly anything that anyone can think of, done by any level of government, that is not shared by three or more levels of government, from building roads to schools, to hospitals, to national programs.

Medicare is a program that came out of the poorest province in Canada and became something that is applied in at least 10 different ways, but we have a national program at work, which we understand. It is applied to different standards and different objectives in different ways in each of the provinces. Within the provinces, we should not forget, it is applied in different ways. You cannot argue that if you live south of Bloor Street in Toronto, your medical care is exactly the same as if you live in Espanola. It is not.

We try very hard to see that standards are set and people have equal access, but the truth is, it is applied in different ways because it has to be. So are our schools. There are some kids who walk five minutes to some of the finest educational institutions in the world and there are some who get up at 6:30 in the morning and ride a bus for two hours to get there.

Try as we might, whenever we go at this, we basically use the premise that the Canadian way to do this is a shared-cost process. Where we can, we establish criteria, standards, objectives, whatever words you want to use, and then we try to meet those. I am not as concerned about that part of this as many people would be. I think we are fairly successful at that because of the multitude of ways in which we have done it. There is a national police force in Canada, the Royal Canadian Mounted Police. Ontario did not opt to use that as our provincial police force. We have the Ontario Provincial Police. I have not heard anyone make an argument that the OPP is not as good at provincial policing as the RCMP is in British Columbia. I think that is known territory. That is the basic argument I am making. I am not as afraid of that as I am of some other sections.

## 1110

If I get the charter stuff done, if I establish that my rights as a citizen of British Columbia are the same in terms of medical care as the rights of an Ontario citizen and I can make that argument, then I am not concerned that BC runs its own medical plan as much as I would be without the equality rights sections being in there. I can go to

court and make an argument in front of a judge that I do not think Ontario does as good a job at providing child care as some other province. That is known territory. That is the Canadian way of doing things and we do it to different standards in almost everything I can think of. Part of the process in Canadian politics is to see how we take a national program like education and apply that in different jurisdictions.

Nobody has the fallacy that the educational system in the territories is the same as it is in southern Ontario. It is done in a different way. We try to meet those needs in different ways. We are into new technology. So I do not share the angst that you have about the shared-cost programs or the opting-out provisions under those, simply because the track record in Canada is very much there. I tend to agree with those who have said to this committee that that is really no change. That is the way we do things in Canada. If there is a change, we have now written it down where we used to just negotiate our way through it. I would be interested in your observations on that.

**Ms. Pieterston:** It is interesting; the programs you have mentioned are the programs that are already in place.

**Mr. Breough:** Yes.

**Ms. Pieterston:** I agree, we do a good job at them; and I agree with you, educational facilities in the Northwest Territories are probably not what they are in Toronto. Health services are different because sections of the country are very different. I still find the terms vague, and what concerns me is the vagueness.

I am sure the intent was not to destroy social programs that we have—"Ah ha, now we are going to set it up so that different regions have different social services"—but we still have to go by what is written down. You and I can agree in our intent and how we envision Canada, but that is not worth anything. What is important is what is written down. I think it could be solved by changing the vocabulary that is being used, and words, as Mr. Hudecki said, are very important because that is all that people are going to have to work on in a few years.

We can feel very strong and very secure with the programs we have in place, but we do not know what is coming in the future, and I would hate to see problems over vagueness and wording.

**Mr. Breough:** I guess the difference is simply this: I bought this suit at a store in Oshawa where I buy all my suits. I go into that store now and I know Murray Johnston's staff. I know the quality

of goods they have. I know where they get their goods made. I know they are union-made. I know they are going to cost me a good buck but they will last me a long time. When I walk into that store, it is known territory. I do not stand around reading the labels. I do not question the employees about who made a suit or whether it was made in a sweatshop in Taiwan. That is all known ground for me.

I really view these provisions of the accord in much the same way. If this were totally unfamiliar, then I would raise a lot of suspicions, as I would as a first-time buyer in any consumer market. You want to know all of these questions. You want to know the specific meaning of each word. You want to see the total sales agreement. If it is a lot of money, you will take it to a lawyer and pore over what the words are and what the escape clauses are and all of that.

In the Canadian political experience, we use the shared-cost approach to almost everything we do. It is a known entity. We argue after the fact about whether we have applied this fairly or not. That seems to me to be the critical part. As a citizen of Canada, I want to see that I am treated equally in all parts of the country, and that is the paramount thing in all of this. If I have those charter provisions in there that assure of equality, I can have the finite arguments about whether my medical care in Espanola is exactly the same as it is on Bay Street in Toronto. I know what I am dealing with here. It is familiar territory. That is the process that we used. The reason I do not have the anxiety about it is that currently there are no such provisions. We have come to this point by negotiating our way on individual packages and individual programs. We are now at the point where we do establish national policies, and in some cases national legislation like the Canada Health Act, but each of the provinces then proceeds to implement that.

I am just making the argument that I appreciate that the words are fuzzy, but as it is now, there are no words to be fuzzified, so to speak. I do not have the concerns there. I understand the point you are making, and I think it is valid, but I alleviate those concerns the moment I assure myself of equality of treatment in the charter provisions.

**Ms. Pieterston:** Could I just make one more point? If there are no fuzzy words or unfuzzy words at the moment written down on how these programs work, then if we are going to put them on paper, let us make sure they are not fuzzy.

**Mr. Breough:** OK.



**Mr. Chairman:** Before turning to Ms. Roberts, I know I expressed the view of the committee that we are delighted to know now the answer to the question of why Mr. Breaugh is always sartorially resplendent. There will undoubtedly be a run on a certain Oshawa men's wear store.

**Mr. Breaugh:** Murray Johnston said to me, "If you mention my name, I will take off 10 per cent."

**Miss Roberts:** Just to carry on from what Mr. Breaugh has been saying, and from your last comment, is it more important to you to have those words in or out with respect to the shared cost? Words in are just as important as words out of the Constitution. What this might do with respect to transfer payments and opting in and out—is it more important to you that it is there or not? Have you looked at that point of it?

**Ms. Pieterston:** No. We were looking at it solely from the point that the words are there now.

**Miss Roberts:** Then my last question to you is with respect to process. You are here today and you are educators. I am going to ask you to think very carefully of what the process should be and your participation in the process. Constitution-building is a very long, drawn-out process, and basically we are just starting on the road. The 1982 Constitution is there, and there are many parts of it that are going to have to be defined, redefined, maybe changed.

One comment I would like to make is that maybe 10 or 20 years ago, multiculturalism would not even have been spoken of with respect to a charter. I am concerned about putting in too many words that are going to be stopping the growth of Canada as we may see it in the future.

As educators, how can you help us in this process? Have you thought of that?

**Ms. Pieterston:** It is an interesting perception. I have not thought of it in terms of educators. I can only talk about my own reaction to the accord, and it seemed to me there was this mad panic to get this document put together. I did not feel that very many people knew very much about it. We just suddenly had this accord, and then once it was there, people started saying, "Hey, there are some problems with it." There were committees called in August where people could present briefs.

I do not like the way this has happened. It seems to me this is after the fact. I think maybe we should have done this a long time ago, before we had governments ratifying the accord. Hind-

sight is terrific. At the same time, you cannot have a process that bogs down so badly that you can never amend anything. My answer to your question is, I do not know. Somehow I feel we need to establish a process.

**Miss Roberts:** Thank you.

**Mr. Chairman:** I think we would all say as members of this committee that the question of process is an important one and that we would never want to go through this process again in this way. Clearly, whatever we put forward or whatever evolves, if not only the House of Commons and the Senate but also provincial legislatures are to review proposed amendments to the Constitution, there will have to be a process that will enable legislators not only to think and reflect and study before voting, but also to provide for organizations such as yours, and other individuals, to come forward with their points of view.

## 1120

A number of people have stated that perhaps one of the biggest problems with the accord is in fact the process. I am not saying we would necessarily have arrived at the same place had we gone through a six-month or whatever series of meetings and so on, and then followed with a signing or amendments, but the sorts of things you note I think have been noted by many as concerns: How do we really know what it all means and was it done in too much haste and so on? I think we see that as an important part of our terms of reference in being able to try to come to grips with that question.

I want to thank you both very much for joining us this morning, presenting your brief and sharing your thoughts and concerns with us.

**Ms. Pieterston:** Thank you very much for the opportunity.

**Mr. Chairman:** I would now like to call upon William Robertson, if he would please come forward. I note for the record and to the committee that Mr. Robertson presented exhibit 13 to us. He has given us another copy. There were some changes, so it now is exhibit 129. I believe everyone has a copy of it, Mr. Robertson, so if you would like to present your views, we will follow up with some questions.

WILLIAM M. ROBERTSON

**Mr. Robertson:** Thank you for the opportunity to come here and present my personal opinions on the Meech Lake agreement. I will deal with Quebec's special status, the opting-out provi-

sion, some reform to the Senate and the Supreme Court of Canada.

In my view, in the present form this masterpiece of obfuscation should keep the Canadian legal profession happily and profitably engaged for many years to come. While its honourable and laudable intention is to find some face-saving formula to allow Quebec to formally sign the Canadian Constitution, in my opinion the price to be paid can neither be justified nor accepted by those who believe in one united Canada and not a loose federation of petty fiefdoms and independent associations, all with their own special interests and objectives.

Recognition of Quebec as a distinct society where most French-speaking Canadians live: so what? Are other, mainly English-speaking provinces not just as distinct societies? What about the other areas in Canada where neither French nor English are the native languages? The only really distinctive societies in Canada are those of its original inhabitants. All the rest of us are immigrants.

Quebec's role to preserve and promote its distinct identity also includes the responsibility of protecting the rights of all its residents, not just those who are French-speaking or of French origin. It is the English-speaking section of its population whose rights have been abrogated by the infamous Bill 101. Had a similar bill been introduced elsewhere in Canada against a French-speaking minority, it would have been considered racist in intent. Bilingualism in Quebec is just, fair and equitable, but a unilingual French Quebec and an officially bilingual Canada for the rest of the country is not.

I am totally opposed to any special privileges for Quebec or for any province, and also to the opting-out provisions of the Constitution. We continually harp on our distinct Canadian identity and our multicultural diversity. All Canadians are supposed to have equal rights, but in fact we spend all our efforts trying to fragment the nation into a multitude of conflicting ideologies and special interest groups.

We want free trade with the United States, but we have neither free trade nor equal access between provinces in our own country. Whether in the practice of a trade or a profession or the simple transportation of goods across the country, there are a multitude of rules, regulations and restrictions which operate like those of a collection of little principalities to the costly detriment of all Canadians.

We are all equal, but some have to be more equal than others because they speak a special

language or belong to a special religion which needs special schools to preserve its unique identity. What utter nonsense. Why on earth should Quebec have special immigration rights to preserve its unique character? That could be interpreted as meaning that the existing racial balance should be maintained for ever. If entry into Quebec is to be controlled by the Quebec government, will it also want to control exit from the province?

If Quebec has the right to promote its distinct society with a francophone majority, presumably all other provinces have an equal right to promote the rights of their anglophone majorities and resist any attempts to expand the rights of their French-speaking residents or those of any other minority ethnic group. Is that what we want in Canada? Taken to its logical conclusion, in every province the existing national mix could be frozen for eternity.

What about the rights of our native peoples in the Northwest Territories, for example, where they are in the majority? Will they be allowed to control immigration to their area? Will they have a special say in promoting their unique societies? As it now stands, it would appear that the Northwest Territories will not be able to obtain provincial status without the consent of all 10 provinces and the federal government. We cannot have one united country, Canada, with equal rights for all citizens and at the same time give special rights and privileges to Quebec or any other province. Immigration must remain the responsibility of the federal government; consultation and collaboration with the provinces, by all means, but that is all.

The Supreme Court of Canada: I question the justification for at least three of the nine members being from Quebec just to be able to deal with Quebec's system of civil law. It is out of all proportion to the rights of the rest of the Canadian population. If this is still mandatory, then at least one of the three Quebec judges must be an anglophone.

New legislation now before Parliament proposes to make it compulsory for all federal court judges to be fully bilingual. This is another example of the promotion of the rights of the francophone minority over the rights of the anglophone majority. Appointments to the Supreme Court of Canada must be based on clear recognition of ability and competence by their peers in the legal profession and the general public and the approval of the Queen's Privy Council, irrespective of their province of origin. Recommendations may also be made by the



provincial government, but the final choice must remain with the federal government. As judges are supposed to be impartial and nonpolitical, the federal and provincial bagmen must have no say in appointments to the Supreme Court of Canada.

The Senate: the Senate must be reformed and freely elected by the people of Canada in the same way as the House of Commons. Its role must be strengthened by freeing it from appointments by political patronage. Its real function is to serve the interests of the people of Canada, not any particular political party or province. As an interim measure, giving the provinces some say in appointments to the Senate only extends the scope of political patronage but does nothing to eliminate it. Only a freely elected Senate can meet the needs and wishes of the people of Canada.

The federal government and the House of Commons alone have the authority to reform the Senate according to the will of the people of Canada. Royal commissions should be appointed to draft appropriate legislation for an elected Senate to be presented to Parliament for ratification before the next federal election. The Senate will then be free to serve the people of Canada and not the interests of the political bagmen who wield the power today.

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In conclusion, the Meech Lake accord was drawn up by honourable men of good intentions. In an atmosphere of goodwill and understanding, it can provide a foundation for beneficial reforms to the Constitution. However, as Shakespeare said, "The evil that men do lives after them; the good is oft interred with their bones." Thus, the Meech Lake accord must be open to the comment and careful consideration of the people of Canada whose will in the last resort must prevail.

**Mr. Chairman:** Thank you very much. You have put forward a number of interesting thoughts; as well as the particular case of the Senate, a recommendation that is an interesting one in terms of just how we would go about redefining the role of the Senate.

One of the questions that underlines some of the points that you are putting forward is how we wrestle with the question of what is national. Is the federal government the national government or is it a federal government? The definition of the national will, the definition of national programs, whatever, inevitably is done by bringing together the federal and the provincial governments because each has certain spheres of influence.

In looking as you look at, say an institution such as the Supreme Court, is there not an argument to be made that because that court, among other things, is interpreting constitutional matters that may arise from time to time concerning the federal and provincial governments, that there needs to be a very clear role that the provinces have in the development of that court and in the appointment of judges? I would be interested in your reflections, because I think it is something that as a committee we are wrestling with in trying to come to grips with that whole aspect of having a strong federal government and strong provincial governments and determining what is national.

**Mr. Robertson:** I appreciate the point you made, but there is a point I am trying to get over. You mentioned the national government, the federal government.

**Mr. Chairman:** Yes.

**Mr. Robertson:** I think the thing that a lot of people forget is that all governments in Canada answer to the people of Canada, and in the order of supremacy it is the will of the people of Canada that is supreme.

As far as the appointments to the Supreme Court of Canada are concerned, I am not saying the provinces should not have a say in the appointments. The point I am trying to make is that, as the Supreme Court of Canada has to deal with measures of the interpretation of the Constitution, of what we have written, the legal matters, etc., the thing that is most important is the competency of the court itself, the members of the court. In other words, an appointment should not be made to the court just because it is felt that this one should go to such and such a province or that province.

What we have to ensure is a Supreme Court that fully represents the needs of the people of Canada, irrespective of their origin. In Canada at present, for instance, one could say that it is quite possible that an Ontarian may be appointed as the Supreme Court representative of Quebec because he may have been born in Ontario and moved to Quebec. The reverse is also true.

The point I am trying to hammer home is let us not fragment all appointments into, "This is your allowance; that is their allowance." Let us concentrate on the main function of the appointments, the ability of the members to perform the duties that they are required to do on behalf of us, the people of Canada.

**Miss Roberts:** Thank you very much for your presentation, and in particular your concerns with respect to the Senate. That is one thing I

would like you to elaborate on a bit more. The first ministers are to get together some time in the future. On their menu is going to be reform of the Senate or looking at the Senate. You are suggesting that they do not do it in that process, that it be done directly through a royal commission by the federal people. It is a national body, and you think the national government or the federal government, the government in Ottawa, should be responsible for it?

**Mr. Robertson:** Again, let me clarify a point here. I am not saying the provinces should not get together and discuss Senate reform. I think it is a good idea, but it is a bit like the Meech Lake agreement. The reform of the Senate is not just a matter for the provincial premiers; it is a matter for the people of Canada.

Like every other problem that comes up, we appoint royal commissions as one of the Canadian ways of tackling a problem. In that way, you do have the input from people who are not members of any provincial government. They are private citizens, other interest groups, etc., which does not really matter. Perhaps, logically, it might be better to have the royal commission first, where you get input from everybody, present the recommendations in parallel with the provincial premiers and then, once you have some sort of agreement, the government in power, which has drafted appropriate legislation, brings it towards Parliament for ratification. As I suggested here, this is a matter of supreme importance, that whatever is drafted should be set to the test of an election.

**Miss Roberts:** What you are suggesting then is that the provincial legislatures should not have anything really to do with the passing of that? It would not be sent back to us in any way, shape or form to look at and ratify this particular change?

**Mr. Robertson:** Under the present Constitution, you cannot ratify it without the agreement of the provinces. Is that not correct?

**Mr. Chairman:** That is correct.

**Mr. Robertson:** I have assumed that until the laws are changed, the existing laws apply. However, if it is done solely with the provinces, then I think that you are following a pattern in the Meech Lake agreement. I come back to the Meech Lake agreement. I believe the people who drew up the Meech Lake agreement did it primarily to get Quebec into the Constitution. I do not think there is any doubt about that. As far as the Premier of Quebec is concerned, he has a problem. He has to get back into the Constitution, to sign

the Constitution under some sort of terms that he can still preserve his political base in Quebec. So the premiers and the Prime Minister have sat down and have come up with the Meech Lake agreement, I say in all good intent.

Granted their intentions are honourable. I still think that an agreement drawn up hastily by 10 people alone—and we already have statements made that on no account are they going to modify or change this agreement; Quebec has signed it—is not the democratic way to do it. I can see their bringing up an agreement and presenting it to Parliament to be ratified in the normal way; that is a democratic agreement.

With the reform of the Senate, all parties are involved, the provincial governments and the federal government. Primarily, we want a Senate which will be responsible to the people of Canada. We do not want a Senate that is appointed through patronage.

**Mr. Breugh:** Many of us are kind of struggling with a number of things on this agreement.

**Mr. Robertson:** I am sure you are.

**Mr. Breugh:** The process is one which is not helpful, to be blunt about it. The concept that 11 people met in secret and put together an agreement that nobody else could touch is distasteful, to be polite. It really runs against our democratic notions.

In part, what we are trying to do with this committee is to try to put a little balance into that to see that there is an opportunity for people to come forward and put their positions and to struggle, as the people who drafted this agreement did, with the basic concept of the rights of minorities as opposed to the power of a majority. In many respects, if there is a critical factor in there, it is to try to assess whether they were successful at that. I think we start from the position that any time we say that someone has a constitutional right in this country we are talking about something that is new and different. We have not had constitutional rights in Canada for very long.

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**Mr. Robertson:** May I just interject one point here? I think we dwell very often too much on rights and not on responsibilities.

**Mr. Breugh:** That could be, but you see, as someone who grew up as a little Irish Catholic boy in a predominantly Protestant United Empire Loyalist community, I think I have some sensitivity to the fact that maybe the majority is



not always correct. Maybe once in a while there may need to be a legal right which the majority of people frankly do not want, it is going to cause them some inconvenience. Striking that balance, which is difficult, is what this constitutional exercise is about. Now, whether a correct balance is struck here or not is a good question, and we have heard testimony from all kinds of people that the balance is out of whack.

Let me put to you that that is our problem, that is what we have to wrestle with: an assessment of whether the balance was correctly struck in this accord or not, part of which is the newness of constitutional issues. We are having trouble with that.

As someone who has been elected for a while now, for example, I probably should have known that seven of the 10 provinces have immigration agreements and that Quebec is no different from six other provinces in Canada in that regard. When you read the fine print in here, it is pretty hard to disagree that if it is good enough for Nova Scotia, why can Quebec not do the same thing? Well, of course they can and they have for some period of time.

I think too that we have to struggle with the notion of where does democracy fit in this? The suggestion in here as to how to appoint people to the Supreme Court is a little bit different from what we have traditionally done. Part of our assessment process is, what have we traditionally done?

That is not a well-understood process in Canada. At least now, though this might not be a perfect arrangement in this accord, at least it will be out in the open. Whereas previously it used to be a phone call to a Premier's office saying, "Who have you got that would make a good Supreme Court judge or a good appointment to the Senate?" they will now have to put forward a list. The federal government still retains the right to say, "Yes, we think that is a good person;" or, "No, we do not like that one." We have had some argument as to what happens if you do not get agreement on that and you arrive at a stalemate.

But I think the larger question we have to address, and I would be interested in your comments on this, is just where does democracy fit into this process? We are not off on the right foot if we are off on the assumption that 11 people can meet in secret, strike a deal and nobody else in Canada has a right to amend that deal, no one else in Canada can change that.

Maybe many of us will be satisfied if we say: "Listen, that is the last approach of that nature that we will ever have in this country. From this

point on, here is the process we will use to change the Canadian Constitution: public hearings across the country, motions through the legislatures. They get forwarded to the federal Parliament. They go on a first ministers' conference agenda, and then you can make your decision."

I would be interested in your perspective on what we do from here. How do we change this process that has a lot of faults and make it into something that is better, more acceptable and gives the Canadian people access to this process?

**Mr. Robertson:** As far as I am concerned, 11 people in Canada do not have the right to change arbitrarily the Constitution of Canada. Now, you can say that they still have not really got that right, because if Parliament does not pass it, it does not become law. Correct?

**Mr. Breaugh:** Yes.

**Mr. Robertson:** I think the difference is that it was done in a hurry, it was done in good intent. It could have been done exactly the same way but, instead of coming out with the agreement, they could have said: "We have had a meeting. We have a problem with Quebec. Here is what we think is an acceptable solution. We are going to accept that as it is at the moment, but we are going to present it to Parliament in the normal way for consideration by the people of Canada." In such case you have a process that is open for change and modification.

If I go a little bit further and look into the future, had we at this moment an elected Senate—and by that I mean elected in the same way as we do our House of Parliament; it may not be exactly the same in the mechanism, but what I mean is that the members who wish to be appointed to the Senate have to run for the office—if we had an elected Senate like that even today, with the present powers of the Senate unchanged—in other words, if it had the power to delay but not completely veto the Meech Lake agreement—I would probably be happy with Meech Lake because I would say that it has to stand the test of Parliament and it has to stand the test of the Senate.

But in actual fact we have a Senate that, although it does good work, when it really comes down to the fine line, as we had in a recent case where it delayed a bill, finally it did not have the courage to veto it. It washed its hands of it and walked away. I do not want to see a Senate like that. I want to see a Senate that accepts its responsibilities and acts on behalf of the people of Canada.

I have another little point to take up. You mentioned the fact that you are in a minority

situation because of your religion in a community that was predominantly Protestant. Is that not correct?

**Mr. Breagh:** Yes.

**Mr. Robertson:** When Pierre Trudeau gave his speech on television, he was very strong—and I must say that I very rarely agreed with Pierre Trudeau while he was the Prime Minister of Canada—but he made the point and he hammered it home time and time again. He was a Quebecer. He did not need any special privileges to compete in Canada. In my brief that is one of the strong points that I am making. I object to special privileges to any province, not just Quebec. I would like my brief to be taken not as anti-Quebec but as pro-Canada.

I actually sent a copy of my initial brief to Pierre Trudeau. I was interested to hear him on TV and I passed him my views. One of the points I made to him myself was that I have actually worked in Quebec, I have worked in France and I have worked in various parts of the world. By my accent you know that my origin is Scottish, but I am a Canadian citizen.

When I worked in Quebec I did not ask for any special privileges to work in Quebec. I did not ask for special privileges when I worked in Japan for a short time, or in other places. I took the situation as it was and I fitted in. I believe that somebody who comes from the outside has a duty to fit in.

However, there is a difference between fitting into an environment where we are supposed to be one nation, Canada, and at the same time we make special distinctions. I made the point that whether you are a pipefitter, a teacher, a lawyer or an engineer—perhaps only a politician has the privilege that he can work in any province without having to have a special certificate.

**Mr. Breagh:** It is unskilled work; that is why.

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**Mr. Robertson:** In trades and professions, because of the way we set up our provincial boundaries, we cannot really move freely from one end of Canada to the other. If I am a trucker, I have to have so many licences that I can hardly see my truck to move goods from Newfoundland to Vancouver.

Now everything that we do to make special distinctions, special status, means that everyone of us in Canada is all the poorer for it. Through the tone of my brief, you may think I am anti-Quebec. I am not anti-Quebec. As I said, I have lived in Quebec, I have worked in Quebec. I

speak French, perhaps not as well as I would like to speak French, but I still maintain my interest in French. I take the odd night class and that just to keep fresh in the language.

If I was working in Toronto where we have a large Italian-speaking community and we were having a similar situation to working in Quebec, I would certainly make a point of learning enough Italian to be able to work and live amicably in that particular area of Canada where I live. But at the same time while not opposing any attempts at Quebec to preserve their language or their national characteristics—

The first speaker made the analogy of a family. I have four children. Each one is unique. Each one of us around this table is unique. But if I have four children I treat them all the same. I cannot say, "Well, sorry you have special status, because you are the eldest son or the younger son, or younger daughter. We are all part of a family." That is what we have to aim at getting in Canada. We have to abolish these artificial boundaries between the different areas of the country, whether it is the Northwest Territories, whether it is Quebec, Ontario or Manitoba.

When I first came to Canada I was really astounded when I travelled across the provinces. "Everybody hates Toronto" is the attitude. Ontario hates Quebec. Quebec hates the rest of Canada and as far as Alberta is concerned, "Let these people down east freeze." If you are playing hockey, that is fine. But if you are a country, you cannot accept that.

Within our own country, no matter what language we speak, what our origins are, we are all presumably Canadians. We all have equal status and that is what we are aiming for.

**Mr. Chairman:** Mr. Robertson, I think your last comments are perhaps a good place to end because you have I think given us, not only in your brief but in the answers to the questions, certainly a strong sense of your desire at maintaining and enhancing that which makes us Canadian. We are particularly grateful when a private citizen comes forward and thinks through his thoughts and arguments and places them before us. A number of us have made the reference that it would be good for a lot of the committee processes if in fact more citizens would feel that they can come forward and not feel that they need to be intimidated by this procedure.

We thank you very much for taking the time to prepare your brief and for sharing your thoughts and comments with us this morning.



**Mr. Robertson:** Thank you very much.

**Mr. Chairman:** If I might now call upon Anna Czesnik, the Refugee Host Program co-ordinator, and Richard Paterson, volunteer with the Refugee Host Program.

I believe that we all have received a copy of your brief, and as we have with our other witnesses I will let you present the brief. We will follow up with questions and we thank you very much for coming and being with us this morning.

#### REFUGEE HOST PROGRAM

**Ms. Czesnik:** Thank you very much. Dear members of the select committee and ladies and gentlemen, my colleagues and I are honoured to be here today and to have the opportunity to comment on the Meech Lake accord. We are participants of the Refugee Host Program which is federally funded and administered by the Kitchener-Waterloo Young Men's Christian Association.

The goal of our program is to help in the integration of newcomers in our community by linking them with Canadian families. There are over 120 such families in Kitchener who have volunteered their time and energy to befriend refugees who come to our city. They are teachers, nurses, engineers, students, homemakers and mothers. Many of them have worked with refugees since the 1979 boat people crisis and continue to make valuable contributions to the settlement of refugees in our community.

In view of our extensive refugee experience, our presentation today will focus only on the immigration chapter of the constitutional accord. Our presentation will be in two parts. I will make a very brief one and then Rick Paterson will continue.

Our committee from the Refugee Host Program in Kitchener sees the following points as possible ramifications of the immigration provisions of the Meech Lake accord. We urge you to take them into consideration and reject the section of the accord which would offer Quebec greater autonomy in refugee selection and settlement and would ultimately allow all provinces to act independently.

Federal financing of settlement in Quebec of disproportionate numbers of refugees, would mean that residents of Ontario and other provinces would be promoting Quebec's economic development through their income taxes. The accord does not seem to make provisions for refugee determination of claimants. If acceptance were a provincial responsibility provinces

would have to station officers at all points of entry.

There is a possibility that residents of refugee camps might wait even longer for processing if they had to deal with provincial authorities who could probably visit the camps only on an infrequent basis. As it is, with more centralized federal bureaucracy, many refugees arrive here after six or seven years in the camps.

Provinces which are extra selective about the refugees they take in are not especially altruistic. It is a greater humanitarian gesture to accept refugees on the basis of their need for asylum rather than their linguistic capabilities.

Quebec's favouritism for francophone refugees, which would mean South East Asians and Haitians, would be construed as a form of racial discrimination and therefore a violation of the Charter of Rights and Freedoms. Provincial responsibility for settlement would mean different benefits in each province. This will result in a second migration of refugees to those provinces with the most attractive benefits packages.

For example, the quota for Kitchener-Waterloo for the year 1987 was set at 245 people, however, an additional 104 secondary migrants arrived. The accord does not address the question of job security for immigrant settlement and adaptation program workers when settlement becomes a provincial matter. It is not known whether ISAP workers would be retained as provincial employees.

Designating refugees as residents of Quebec, or of any province, is unrealistic because the charter guarantees freedom of mobility. At the present time approximately one third of refugees who are settled in Quebec choose to relocate to other provinces, primarily Ontario.

If the provinces get involved in refugee selection, it is not certain that they would be included in international forums. The United Nations High Commissioner for Refugees might resist offering accreditation to delegates from the 10 provinces and the territories.

Separate action by the provinces would threaten Canada's image abroad. It would leave the impression that the country is disjointed and disorganized. Refugees abroad would be confused by having to apply for asylum in provinces they have never heard of. They only begin to distinguish between different jurisdictions once they are settled in Canada.

**Mr. Paterson:** Canada is a large country with a small population in a crowded world. Over the years it has built up a worldwide character and reputation for having a heart as big as the size of

its country. This heart is an example to the people within her borders as well as the world watching from without.

Individuals such as Norman Bethune, Lester Pearson, Chris Giannou, Brock Chisolm, Robert Bateman, Nancy Pocock, Robert McClure and many others went out as Canadians into the world.

Canadian armed forces personnel supported the International Control Commission in Vietnam and peace keeping duties in Cypress, Gaza, Lebanon, as well as refugee evacuation work in Chile.

Nongovernmental organizations such as the Canadian University Service Overseas, Canadian Crossroads International, the Mennonite Central Committee and many others, have provided Canadian volunteers to work on development in the Third World.

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During 1969-70, millions of US dollars were funnelled through the Canadian Red Cross for food and medical aid to civilians in the Nigerian civil war. As well, Canadian relief agencies provide personnel and resources in times of disaster and famine.

Canada is well known as a supporter of Third World development by countries such as Norway, Sweden, Germany, Great Britain, France, Holland, Italy, Australia, Japan and others.

In 1979-80, Canada's caring and sharing role took a giant step forward for mankind. To help with the crisis of Boat People refugees, the government of Canada offered to support small groups of Canadians who wanted to sponsor a refugee or refugee family. Other countries watched this Canadian experiment. In Canada, people gathered in groups and applied as sponsors. Eventually, thousands of refugees beyond the original projected figures were sponsored across the land. For this type of program, it was possibly the most successful in history.

In the not too distant past, Canada's response to refugees has been disgraceful. In 1986, however in recognition for work with refugees, the people of Canada were awarded the Nansen medal. The foremost award in this field, usually presented to individual persons or agencies, for the first time was presented to a country, Canada.

Canada's high level of integrity and commitment to caring and sharing has been recognized and honoured by her peers in the field of refugee work. The government-supported refugee program is a vital part of Canada's work to help the Third World. Canada's image internationally has

been built by the toil of individuals, nongovernmental organizations with their volunteers, agencies and all their supporters in Canada, and by branches of the federal government.

The proposed changes to the government-sponsored refugee program will divide and devalue the honoured role Canada has grown into, earned and plays on the suffering world stage, role-modelling the high aspirations of mutual responsibility and interdependence to a world that is often frightened, confused, cold and hungry. This modelled behaviour is important to any society and more so in the world society. Canada is living the role of caring and sharing collectively and is recognized by her peers as the best at it.

Canada has a small population in a large country. It is seen by the world as having a large heart. From our past, there have been times of small heart and no heart at all. Why do we want to return to that? Why do we want to show the confused and needy refugees of the world that we are a confusing bunch of little parts in what was formerly known as Canada?

Many Canadians have paid a price to help the Third World and the Third World has learned of the character and humanity of Canada. Let us not do anything to confuse or make this earned and learned image any less in any way.

**Mr. Chairman:** You have focused on an area that has come up from time to time, but I think your particular perspective and background lends a different element of interest to our discussions this morning. I will begin the questions with Mr. Elliot.

**Mr. Elliot:** Thank you very much for your presentation. By way of preliminary comments from my own point in welcoming you here, I would like to let you know that I graduated from Kitchener-Waterloo collegiate. In introducing the YMCA the way you did, you left out the name of A. R. Kaufman, whose son owned and operated the farm next to the one I managed in my teenage years and my young adult years as I was going through university.

The reason I mention his name is that I think the importance of your brief, and I am sharing this with the rest of the committee, is that it points out, because of the YMCA being named after Kaufman, that there has been a long tradition of refugee acknowledgement from a reception point of view in the Kitchener-Waterloo area.

Because of what you are saying in your brief, I suppose the type of thing that was happening when I was a teenager and a young adult in the area is still continuing. My own wife came from a



displaced persons' camp in Germany as an Estonian immigrant. I know the only reason she was assimilated into the Kitchener-Waterloo area and learned English as quickly as she did, in spite of the fact she learned it at school in Germany and in Estonia, was because of the number of volunteers, some of whom we still correspond with on a regular basis.

That tradition in the area gives a lot of credibility to the kinds of concerns you have. It also is a reason why, when I found out the immigration problem with respect to the accord was going to be paramount in a lot of people's minds, I asked the young person I have on my staff who is doing my research for me why there was the concern with immigration in Quebec.

The kind of information he gave me was that as the proposed amendment states, it is 25 per cent plus five per cent, possibly 30 per cent. Apparently, in the last year or two, immigration coming into Quebec is around 19 per cent, so it is a kind of aim they are trying to get. The main problem with respect to Quebec is the declining population there. The birth rate is dramatically lower in Quebec than it is in the rest of Canada, so it is a real concern.

The other piece of information he was able to find is that there are at least six centres in the world now, sponsored by Quebec, that are actively seeking and promoting immigration to that province. This caused me a lot of concern the first time he reported it to me, but I am no longer concerned because I have double-checked and they only operate in close assimilation with the federal immigration outlets in the same centres. One of them is in Paris, for example. They work in tandem as opposed to working exclusively for Quebec.

The kind of thing you are talking about with respect to all 10 provinces doing the same thing is not a concern any longer in my mind. It was a concern at the time I asked him to do a little bit of research in that area.

The kind of thing I would ask you to comment on a little more fully is, would you be as concerned if, down the road, you saw the birth-rate problem continuing as it is in Quebec with respect to having a population that is not in decline all the time and never attaining the 25 per cent, and working in conjunction with the federal government in order to try to attain that, knowing full well that a lot of the people, like relatives of my wife who came to Montreal first, stayed the year they were required to be with their sponsor at that time and then came to Toronto? There is absolutely no way the boundaries are closed to

the immigrants once they are established inside Canada.

Are the kinds of concerns you are pointing out in your brief still paramount? If that is the kind of flavour that is associated with it, would you be less concerned?

**Mrs. Czesnik:** I think our main concern is in the selection process of refugees. When you are going out into the refugee camps or going out into the different parts of the world where refugees are in the camps, people from Quebec would want to choose refugees who speak only French. They would be given, I believe, 15 points for the ability to speak French, and of course fewer points for the ability to speak English.

What we are concerned about is if there is a refugee in jail, for example, and his life is being threatened and someone from Quebec goes to interview him and says, "I am sorry, but we cannot take you to Quebec because you do not speak French." This is our main concern, that there will be a lot of discrimination on the basis of linguistic ability.

**Mr. Eves:** As you have undoubtedly heard and probably know all too well, there are agreements the federal government has with other provinces besides Quebec. I take it then that your concern is related to the wording in the accord that is going to guarantee that Quebec receives a certain percentage of immigrants to Canada each year. Is your concern focused on that particular guarantee or is your concern much wider than that? Mr. Elliot was just talking about the immigration services Quebec has, for example, in six other countries. Is your concern an all-encompassing one or are you narrowing your focus to this particular wording in the accord?

**Mrs. Czesnik:** I think our concern with the guarantee is that if the federal government continues to set international quotas and Quebec is guaranteed, I think it is one third of those quotas, what happens then if the other provinces also want to have this agreement and would like to have more refugees? What if Ontario wants more than 75 per cent? What if some provinces do not want any? Does that mean some provinces will have to take more? I think the numbers will have to be clarified a little bit. I do not think it is very clear to us. What if several years down the road Quebec decides it wants only 25 per cent or maybe 15 per cent? Does that mean other provinces will then be forced to take more? How would that work? We are not clear on this.

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**Mr. Eves:** Basically you are very simply saying that all provinces should be treated

equally in this regard, and if you are an immigrant to Canada and are about to become a Canadian, you are a Canadian.

**Mr. Breagh:** I think we need to pursue this a bit, but my understanding is that refugees are excluded from the immigration provisions in the accord. In other words, the accord deals with where people will go after they have been accepted into Canada. Placement in that regard will—my perception is that it really does not do much more than what we have previously done by means of a negotiated agreement. I think seven of the provinces have done this and it talks to placement of people, acceptance of professions, basically the needs of the provinces in terms of one province needing more doctors and would like to assist in the placement of those.

I do think we need to pursue this a bit more, but my understanding is that the basic rules have not changed, that the prime responsibility remains with the federal government and that the accord speaks to placement of people after they have been accepted into Canada, whatever their status might be. In the existing agreements, they essentially are all saying the same thing. They say it in slightly different language. The province of Quebec has opted to do it in more detail, but it is not much more than a placement of people after they have come to Canada, and at least my understanding is that the federal government would not be abrogating any of its responsibilities for immigration or for refugees or for any of that under this accord, but that it formalizes existing agreements. It does not appear to me that there is much in the way of change there.

I tend to agree that perhaps we should pursue that a little more aggressively. What I would like to get from you is whether you have any sense that there is anything different from that.

**Mrs. Czesnik:** From reading the chapter on immigration, we were under the impression that Quebec would have the choice to select refugees. We were also under the impression that if other provinces were signing this, all provinces would have the choice. In other words, a refugee would be accepted by Quebec, and then perhaps by the federal government. The refugee would come first to Quebec, be settled there, and of course the refugees have every right to move if they so desire. Also, all the services that would be provided would not necessarily be provided directly by the federal government, but would be provided by the provincial government.

**Mr. Breagh:** I should tell you that is not my understanding of it.

**Mr. Chairman:** Mr. Breagh, could I?

**Mr. Breagh:** Yes.

**Mr. Chairman:** You are quite right. This is a very important point. I agree with you. We certainly want to check this out, but it is my very clear understanding that would not happen. I think it is important we look at that.

Just in adding, if I can, and then we will get back, some decade or so ago, for a time I was director of citizenship for the province. Of course, we dealt a great deal with the federal government in terms of immigration, because obviously, for Ontario, we had the largest number of people who were coming into Canada. Now again, immigration under the British North America Act is a shared responsibility. As Mr. Breagh says, with respect to the agreements that exist between the federal government and a number of the provinces—the first one was with Quebec—as I viewed that development it was always within the context that, clearly in terms of the selection of immigrants, that authority rested with the federal government, particularly with refugees.

If there was the slightest suspicion that the problem for a refugee coming into Canada was that province X was saying no, I think there would be an incredible furore. All that is aside from the fact that we may feel that the current bill before Parliament that relates to refugees is, to put it mildly, not a terribly open one.

I think that you underline a question that is an important one to resolve, but it is one, to this point, that has been answered for me. I have just been provided with a quote that I will share with you. This is all in the context that we are all exploring and trying to get this clearer. This is a quote from Professor Hogg's annotated book on the Meech Lake constitutional accord with reference to immigration. I am just quoting this one section. He says:

"Subsection 95B(2)," which relates to this issue," carves out an important exception to the general rule. Subsection 2 preserves the power of the federal government to set 'national standards and objectives relating to immigration or aliens.' A federal law that is characterized as setting national standards and objectives, thus, remains competent to the federal Parliament and will be paramount over any inconsistent terms of an immigration agreement."

When he spoke before the committee, both in terms of the fact that the charter—and it is specifically set out that the Charter of Rights must apply in terms of mobility and various other rights—and in terms of this statement, it was his



view that whatever the role of the province might be in developing numbers and so on, the paramount authority continued to rest with the federal Parliament.

**Mr. Breugh:** We want to pursue, obviously, the points that you have raised, but in our investigations so far, my judgement would be that the role of the federal government remains paramount. It decides who is allowed to come to Canada. Subsequent to that and perhaps concurrent in terms of setting targets for numbers and kinds of people, classifications and all of that kind of stuff, the provinces will be co-ordinating and we have now formalized what we previously did by means of agreements between the provinces and the federal government. Frankly, I do not see much need for concern there, as my understanding of it now relates to that. If you encounter problems, we would certainly appreciate hearing from you.

**Mrs. Fawcett:** When you were talking about the possible ramifications of the immigration provisions of the Meech Lake accord, in one paragraph you were saying we would be promoting Quebec's economic development through income taxes if this greater proportion of people were allowed to come to Quebec.

First, I think of myself as a Canadian. If these people are coming to Canada, that is the first provision; in Quebec, I realize the ramifications of that. In the second last paragraph at the bottom of that page, you say: "Provincial responsibility for settlement would mean different benefits in each province. This would result in a second migration of refugees to those provinces with the most attractive benefits package."

I am not sure about that. I just wonder if that maybe would not be because of family friends or other things that would send these people to other parts of the country. Would that not, in fact, then be benefiting all of Canada's economy? If they do not necessarily stay in Quebec, then they are going to other parts of Canada which, in turn, could help the Canadian economy and maybe my tax dollars would not be going solely to promote Quebec's economic development.

1220

**Mrs. Czesnik:** When we were discussing this, our idea was that since Quebec is going to receive one third of Canada's refugees or Canada's immigration, funding would go to Quebec for that number of refugees. Also, one third of those people will leave Quebec and go to other provinces. Perhaps other provinces offer a shorter waiting period for English-as-a second-language classes. Perhaps the refugee feels, "If I

go to Ontario or if I come to Kitchener, perhaps I will get a job much quicker than I would in Quebec." This is already causing a lot of this secondary migration.

**Mrs. Fawcett:** Is that a problem, though? Is that something we do not want, that you do not feel is a good thing?

**Mrs. Czesnik:** Even if Quebec wants one third of Canada's refugees and immigrants, it will not be able to keep them there in a sense. They cannot force them to stay in Quebec.

I think the difficulty it is creating in Kitchener specifically is in housing. Housing seems to be a very big problem there. If we have 104 more people arriving than we had expected, we certainly need more funds for these people to provide them with housing, to provide them with clothing and English-as-a-second-language courses. When we have our budget set for Kitchener, when we have the budget set, say for 245 people, and we then may get 104 more who perhaps come from Quebec—they do not, but for the sake of argument; they may come from other provinces which will already have received funds for those refugees.

**Mrs. Fawcett:** Are you saying that maybe the regulations should be changed in that they should have to stay in Quebec?

**Mrs. Czesnik:** We cannot do that.

**Mrs. Fawcett:** Of course, yes.

**Mrs. Czesnik:** This is an interesting dilemma.

**Mrs. Fawcett:** Thank you very much.

**Mr. Elliot:** As a supplementary to that, a better deal might be portability of whatever money goes with the person until he is assimilated. The Vietnamese families we have sponsored in the Halton region all have similar families in Montreal. The initial package of apartments, housing and that kind of thing in Quebec was a lot better, but the kinds of things you are talking about finally made our people very happy to be in our area and stay there. In fact, some of their relatives started moving this way. The unfortunate thing was that the federal money stayed in Quebec, I guess, for the numbers that they were getting and we are not getting it in Ontario. I know in the Kitchener-Waterloo area it would be a bigger problem than it was in Oakville.

**Mrs. Czesnik:** Yes. We have a lot of jobs available and that news seems to travel very quickly across the country.

**Mr. Chairman:** That is the problem with southern Ontario right now, whether it is just relocation or movement of immigrants in a sense.

Generally speaking, because we have been doing better, we are getting more people.

I want to thank you very much for the focus of your brief. The questions you raise, and I hope our sort of reaction to them, underline not that we are sorry you raised these, because they are very important, but we do want to doublecheck on some of the things we understood these clauses to mean, because we had concerns and would have, I think, similar kinds of concerns to those you have raised. We are going to make sure that we are clear on some of the issues as they would affect the rights of people coming into this country. Certainly, we do not want anything that is going to cause in a constitutional sense more problems for refugees who are trying to escape from various countries.

I would also say to you on behalf of the committee that if, as you go forward from here, there are other pieces of information that you find unsettling, you should continue to be in touch with us so that we can be aware of these. Sometimes when we go through these processes of constitutional change, people's intent is to do

something, but then other things start to come perhaps from those amendments, and we want to be very clear. I think you really have provided us with a focus on the amendments as they pertain to immigration, and that has been very useful for us. Thanks very much for being with us this morning.

**Mrs. Czesnik:** Thank you very much.

**Mr. Chairman:** Just before adjourning, if I could, I have a couple of administrative notes. I am not sure whether this anticipates the distinct society, but two tables are reserved for us downstairs in Abernathy's. There is freedom of mobility to sit at either one. It is on the first floor and the reservation is in Debbie's name.

Would you also make sure before we come back at two o'clock to check out of your room. Fortunately, the clerk is paying the bill.

**Interjection:** No opting out?

**Mr. Chairman:** No opting out on the bill. We will adjourn until two o'clock.

The committee recessed at 12:26 p.m.



## AFTERNOON SITTING

The committee resumed at 2 p.m. in Carleton Hall, Holiday Inn City Centre, London, Ontario.

**Mr. Chairman:** Good afternoon, ladies and gentlemen. If we can begin our afternoon session, I would like to invite Jack Fullerton, Tina Laur and Connor McDonough to come forward. It is a pleasure to welcome you here this afternoon. I believe you have come over to London from Sarnia, if I am right.

**Mr. Fullerton:** Right.

**Mr. Chairman:** So we are pleased, if I can say in a bipartisan way, to invite constituents of Andy Brandt to the table. We have all received a copy of your submission. Perhaps the best thing then is to let you proceed to set out the various points you would like to do. We will follow that up in the usual fashion with questions.

JACK FULLERTON  
TINA LAUR  
CONNOR McDONOUGH

**Mr. Fullerton:** We thank you for allowing us to appear before you. We have been following your hearings on television and we have read the comments that have appeared in the print media. We are here because, like you, we love our country and want to see it live long and prosper. Others whom you have already heard have been learned in the law and knowledgeable about Canadian history. We bring you the perspective of average Canadians with a view of our history and a philosophy of the workings of our Canadian government.

I would like to introduce Tina Laur and Connor McDonough. Both are grade 13 students from Sarnia. I will let Tina and Connor elaborate on their respective backgrounds, but I would like to state at the outset that the three of us unanimously agree we are reasonable people.

**Miss Laur:** Hi. It is my pleasure to be here today. I am 18 years old and a full-time student at Northern Collegiate Institute and Vocational School in Sarnia. I have a close family, including one brother. My areas of interest are in political science and history, which I hope to pursue at university. In the past two years, I have spent three months as an exchange student in northern Quebec and one year as an exchange student in India.

My travels have allowed me to see Canada from the outside as a country of luxury and freedom, but most of all, I have discovered

Canada to be my home. Therefore, I come before you today to share my concerns on the Meech Lake accord, not as an expert but as a young citizen with the hope to preserve Canada as a place I can call my home for ever.

I feel strongly that the concept of the Meech Lake accord is a fantastic step for Canada, but the details of the document must be looked at with care and discretion. Its importance is too great to be rushed into existence. Now I would like you to meet my friend Connor McDonough.

**Mr. McDonough:** Good afternoon. I thank you for this opportunity to speak before you. My name is Connor McDonough and I am a grade 13 student at St. Patricks High School in Sarnia. I am the eldest in my family, with two younger brothers and a sister. Within the past year, I have travelled to both Haiti and Ireland and have seen and learned a great deal. This September, I hope to study political science at the University of Western Ontario.

With respect to the Meech Lake accord, I agree with the concept of the agreement. Canada is in need of constitutional reform. However, I feel that there must be changes in the wording of the accord in order to qualify many of the statements. There are vague and ambiguous proposals that will have far-reaching consequences and will sow the seeds of dissension across Canada.

I have seen, both in Ireland and Haiti, the results of a divided country. The accord must, as is its objective, unify Canada. Today, I ask you to have the wisdom to see the changes that must be made and to have the strength and courage to make these changes.

**Mr. Fullerton:** I lucked out in the choice of these two students. I simply phoned teachers and said I would like to have a couple of brilliant students. I think they did very well in their selection. I represent, if you will, Canada today and these young people represent Canada tomorrow. The accord you are considering will affect them longer than it will affect me, although I hope to be around for some years to view its impact.

I come to you with a background of 35 years as a working journalist chronicling events. In my years as a journalist I have witnessed a lot of memorable events and I ask you to recall one of those events right now.

I ask you to recall and bring to mind that morning when 11 tired men emerged from the Langevin Block in Ottawa. They were jubilant as they faced the television cameras, the microphones and the writing pads of the assembled journalists. Everyone was euphoric. There were congratulations all around. Many photo events were staged in the hours that immediately followed the early-morning signing of the Meech Lake agreement. It heralded, they trumpeted, a day of reconciliation within the Canadian family. But I also ask you to recall that the cameras get turned off, the microphones put away and the notebooks filed in newsroom dustbins.

You will recall that Premier Peterson was hailed in the days immediately following the Langevin Block meetings as the great mediator, the man who had, by cajoling, compromise, wisdom and reasoned argument, brought about the accord. Right now, though, in the free trade debate, I am not sure whether all his fellow premiers use those same adjectives they used on the night of the accord, when there were hosannas in the highest.

But away from the glare of the TV lights of that night, away from the laudatory radio commentary, away from the complimentary headlines, we have all had time to examine the documents that produced those media events. There are thoughtful Canadians, reasonable people who have come to have concerns and reservations about some of the clauses and some of the results that may well emanate from those clauses.

You will, as reasonable men and women, agree that the underlying principle of the document is the belief that reasonable people, given the same set of facts, will arrive at the same reasonable conclusions. If this reasonable philosophy holds, then the accord will hold; but if reasonable people arrive at different conclusions, then the provisions enshrined in this accord, we believe, will lead to divisiveness, shouting and acrimony. There will not be those jubilation days. There will not be handshaking all around. There will not be laudatory comments flowing.

What you will have instead will be snarling voices and shouts of "Turn off the cameras," "Get that microphone out of my face" and "No comment" hurled back at scribbling scribes as politicians scurry down halls, run up stairs or dash behind closed doors.

Will there always be sweetness and light? Will all always be in unanimous agreement on contentious issues as Canada travels tomorrow's beclouded pathways? Do reasonable people always agree?

We think Tina has a comment in this area.

**Miss Laur:** Premier Peterson is a reasonable man and able to think sensibly and wisely. I think some people may be chuckling at that and others are probably pretty sure they agree on that one.

**Mr. Breaugh:** Let the record show there are no Liberals chuckling.

**Mr. Chairman:** Let the record also show that Mr. Breaugh is not always right.

**Miss Laur:** Brian Mulroney, Robert Bourassa, David Peterson, John Turner, Edward Broadbent: reasonable men all, but they do not always agree on a matter, even when they have the same set of facts.

One has only to look at the free trade agreement to see reasonable men in disagreement. If we were to tell Mr. Mulroney that there has to be unanimity before any action can be taken on the serious-for-Canada free trade agreement, he would tell us that such a rule would result in absolute stalemate. Inertia would be the result. Nothing could get done and, he warns us, Canada's economic future could be jeopardized.

We know that for 50 years Canadian politicians of all stripes and persuasions, prime ministers and provincial premiers—reasonable men all—could not get unanimous consent to patriate our Constitution.

**Mr. Fullerton:** We discussed, based on that evidence, what we could expect under this accord and Connor gave us our answer in our debates.

**Mr. McDonough:** The Meech Lake accord demands unanimous consent in several critical areas before any changes that may be required in the future to meet changing Canadian circumstances can be made.

The theme of our presentation, as you will have gathered from the document we provided earlier, was to seek the answer to the question, "Can Canada achieve peace, order and good government with the amendments proposed by this accord in place?" Our conclusion was no, it cannot.

Mr. Trudeau, utilizing perhaps intemperate language, says no, and while we may think many things about Mr. Trudeau, it is generally conceded that he is a man who can think logically, analyse and draw conclusions—the classic dictionary definition of a reasonable man.

An analysis of our history leads one to draw the conclusion that our first Prime Minister, Sir John A. Macdonald, would have come to the same conclusion as Mr. Trudeau, as have many



other people. Are all those who hold this viewpoint unreasonable persons?

Tina, as a world traveller, calls for us to look at a wider parallel.

**Miss Laur:** On the world scene we have the United Nations. The UN has its assembly which can take action in many critical areas on a two-thirds majority vote of its members. Then we have the security council which requires the unanimous consent of its five permanent members on all substantive matters before action can be taken. One veto in the security council stops action, no matter how critical the requirement for action may be.

Would not reasonable men and women, given the global conditions facing this earth, be expected to come to unanimous decisions on such matters as arms control, pollution of the planet, environmental control, nuclear disarmament and world peace? But apparently we cannot achieve unanimous consent among the five permanent members of the security council to save the planet Earth.

Is it logical to expect 11-person unanimity, as will be called for under the provisions of the Meech Lake accord, in order to effect changes in the Canadian Constitution in critical areas involving, as they do, areas of provincial and federal relationships?

In the case of the United Nations, recognition that unanimity was virtually impossible to achieve led to the provision for unanimous consent by the five permanent members of the security council to be modified to provide for action following a two-thirds majority vote in the General Assembly.

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**Mr. Fullerton:** Tina makes the point that unanimity, even among reasonable people, is difficult to achieve. Totalitarianism provides unanimity, but a liberal democracy is guided by the principle that the will of the majority should prevail.

You, being perceived as reasonable people, were elected to office not by the unanimous vote of all the reasonable constituents but rather by a majority of them. The theme of our presentation is that reasonable men do not demand that there be unanimity in too many cases in order to initiate desired change. We further suggest that there is a concept of Canadian history that supports this view. We have drawn your attention to the words of reasonable men and women—noted historians, legislators and legal experts—who have this same view of our Canadian history and heritage.

Now we come to the crux of the situation, the dilemma faced by this committee of reasonable people. Can changes be made in the Meech Lake accord? If they are reasonable changes, then certainly they can and should be made. Or is the logic supporting the late-hour, cobbled-together clauses of the Meech Lake accord so shaky that it will not respond to the challenges of reason applied by reasonable persons? Is the accord so fragile that it will not allow for any improvement that will remove ambiguity or add clarity?

Is it logical to brook no reasonable changes at this time, but rather to rest our hopes for such reasonable changes to a future day, when all changes in an expanded area of the Constitution will be required to pass through the unanimity amending process that will then be mandatory?

Winston Churchill has said: "The only guide to a man is his conscience; the only shield to his memory is the rectitude and sincerity of his actions. It is very imprudent to walk through life without this shield...but with this shield, however the fates may play, we march always in the ranks of honour."

President John Kennedy, in the same vein, said: "When...the high court of history sits in judgement on each of us, recording whether...we fulfilled our responsibilities" to the people, "we will be measured by the answers to four questions: First, were we truly men of courage...? Second, were we truly men of judgement...? Third, were we truly men of integrity...? Finally, were we truly men of dedication?"

The individual members of this committee, in the exercise of their responsibilities, will give their answers to those questions. You must weigh the words of the accord and, in your judgement, determine whether changes must be made, changes we have proposed in our recommendations. Reasonable changes are, we suggest, required. You must have the courage to recommend those changes in full recognition of the consequences of such actions. You have been cautioned that any changes proposed may well be construed by others who deem themselves to be reasonable persons as being harmful to the woof and weave of the Canadian fabric and may result in the rending of that fabric.

We do not for one moment believe that this sundering will happen. Rather, we hold that reason is paramount, that logic will prevail among reasonable people. The earlier document that we submitted for your scrutiny details our concerns. We have examined the accord section by section and have come to the conclusion that adoption of the accord with its present wording

unchanged will not allow for peace, order and good government for Canada and, by devolution, for the province of Ontario. We three reasonable people agree on this.

Connor will comment on our concern with the fundamental philosophy which we perceive underlies the accord.

**Mr. McDonough:** We draw your attention to the fact that the requirement for unanimity is now called for in a much broader area than was set out in the 1982 constitutional provisions. This can only lead to inertia and stagnation. We cite particularly the provisions dealing with Senate and Supreme Court appointments. This accord, with its decentralization bent, will, we fear, ultimately lead to parochialistic nominations by provinces seeking to advance their individual visions of what Canada should or should not be. At a minimum, if this section is not struck down, there is a need for a resolution mechanism to resolve situations where provincial nominations are not acceptable to the federal Privy Council. Even now we can see stalemates developing, and the ink is hardly dry on the agreement.

Some potential divisiveness that we perceive as inherent in the accord clauses dealing with the creation of new provinces has been remarked upon in our background paper. We find an interesting parallel in the case of the creation of local municipalities in this province and note that boundary disputes in this regard have become long, drawn-out, acrimonious affairs. None in recent history has been settled with the unanimous consent of all the parties involved. Both Miss Laur and I can comment knowledgeably on this, having firsthand experience.

**Miss Laur:** In my community as well, we are facing the conflict of a boundary dispute. I live in the newly formed town of Clearwater. There has been an ongoing battle between the mayor of the city of Sarnia and the reeve of the township of Sarnia. The mayor has asked for the annexation of Sarnia township in order that the city may grow, but the township has refused the city's bid and has now gained town status. The township has presented a strong case. The residents are happy with the services they have been receiving from the township and their taxes are generally lower. The people have no interest in joining the city.

The battle has turned into an ego conflict between two men who will never come to a compromise. This conflict has been long and drawn out. The effects and delays are becoming more harmful all the time. The city cannot expand and many businesses are moving from

the city into the town of Clearwater. Public transportation and hospital funding are also in jeopardy. That is how I, as a reasonable person, see it.

**Mr. McDonough:** Tina has told you one side. Let me give you another perspective. I live in Sarnia. Just across the street from me is Clearwater, where Tina lives. Both sides of the street look much the same. Each side has nice new homes and the grass is just as green on either side.

This past weekend, I and a friend had a research paper to prepare. We took a Sarnia Transit bus downtown and went to the Sarnia Public Library and Art Gallery. This is a very common occurrence; there was nothing unusual about it, except for the fact that my friend was using these services for free and I had to pay. I did not have to pay directly for these services; however, my parents have to pay for them through their municipal taxes.

I feel it is grossly unfair for the residents of Clearwater to have the privilege of so many services for free in Sarnia, such as the public library or the city transit, without having the responsibility for their upkeep.

If Sarnia wants to grow and expand because it is presently boxed in by the lake, the river in Clearwater and Chemical Valley, it will have to expand into Clearwater. It must be allowed to annex a part of Clearwater that is deemed reasonable by the residents of the area in order to expand.

However, the major stumbling block to an agreement on the annexation of part of Clearwater is not the opposition of the residents of Clearwater; it is the opposition of the reeve, Ray Whitnall.

Reeve Whitnall is a reasonable man. The mayor of Sarnia, whose goal it is to annex Clearwater, is also a reasonable man. Unfortunately for the Sarnia-Lambton area, and these two reasonable men, they cannot agree. One assumes that they would both come to a reasonable solution, that they could find a solution beneficial to all parties involved. There will never be an agreement, though, because neither party will agree. There can be no compromise for either person. There will never be unanimity.

What is needed to solve this situation is a provincial mediator to come in to find an acceptable decision. They need someone to put his foot down. It is unrealistic to assume the problem will be solved by any other means.



This is very similar to problems that will have to be dealt with if the accord is left unchanged. It is not wise to assume that David Peterson and Robert Bourassa will agree on every point made in the accord. Furthermore, what they might agree on will most certainly have been interpreted differently. We could use the clause concerning Quebec as a distinct society as an excellent example.

With different personalities and interpretations of the accord, there will never be unanimity among the premiers. It is absolutely necessary that we have a central power to decide what exactly is meant by what has been written before, not after, the accord is passed into law. Afterwards, there must be machinery in place to offer compromise, in order to have change accessible to the government and to the premiers. Simply, unanimity will be very difficult to achieve and will probably deadlock provincial and federal relations.

Reasonable men do not agree on everything. They never have and, unfortunately, never will. As I have cited, there is the problem of the Sarnia-Clearwater boundary dispute. Reasonable people are involved in that dispute, but we can assure you that if you wait for unanimous agreement, that dispute will never be settled. An authoritative, decisive voice is needed.

**Mr. Fullerton:** Connor and Tina have illustrated our concern with respect to that section of the accord dealing with provincial boundaries and the creation of new provinces. Seeds of divisiveness also reside, we believe, in the sections dealing with immigration. We perceive here the danger that ghettos at best, or holding tanks at worst, might well be created. This was our perception, as lay people, reading the clauses. In the words of the Canadian poet Robert W. Service, "We ain't as wise as those lawyer guys." Nor did we have ready access to perhaps enlightening documents, but then, as we have noted in our brief, neither do the members of the general public.

In our discussions in drawing up our brief, Tina expressed strong concerns in the area of immigration. I would ask Tina to comment on that.

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**Miss Laur:** I would like to address my concerns today in particular to the immigration clause of the accord. In the original British North America Act, section 95, immigration was designated as a concurrent power with federal paramountcy. Under the current amendment, federal paramountcy is deflated. In section 95A,

Canada is committed to negotiate an immigration agreement with any province that so requests.

Is this to mean that the territories may not receive a fair number of immigrants because they do not have the power to negotiate with the federal government? What if each province were to demand a quota of the immigrants equal to its percentage of the population of Canada plus an extra five per cent? Not everyone can have a five per cent bonus. How many people would we have to immigrate and how can this be divided fairly? Why should one province have this advantage over another, as in the agreement with Quebec? Is it just to allow the bigger provinces to grow bigger and the smaller provinces to decline in population?

The section continues to say that such an agreement, once concluded, could receive constitutional protection. The word "could" is extremely vague. Will they or will they not be protected and under what circumstances?

In section 95B, the federal government retains control over the national standards and objectives of immigration policy by establishing categories, classes and admission criteria for immigrants. This gives the federal government authority to delegate the immigrants to each province according to the agreed quota, but does not protect the province from receiving its quota of immigrants from the lowest category of immigrant classes and admission criteria.

A good example of this, I think, would be that if the federal government was not very happy with one province for whatever particular reason, it might send it a whole list of miners when the province was actually in need of doctors. It does not say what kind of divisions they are going to make and which immigrants will be sent to which province.

Quebec has made an agreement with the Canadian government that it will receive immigrants proportionate to its share of the population with a right to exceed that by five per cent. This statement seems to be very solid, but how can the government of Quebec keep that number of immigrants if they are allowed, under section 6 of the Charter of Rights and Freedoms, to move out and take residence in any province? The Meech Lake accord protects this basic freedom. Therefore, how valid is the Quebec agreement with the Canadian government?

The accord is also to provide an undertaking by Canada to withdraw services, except citizenship services, for the reception and integration, including linguistic and cultural, of all foreign nationals wishing to settle in Quebec, with such

withdrawal to be accompanied by reasonable compensation. What is "reasonable compensation"? The interpretation of "reasonable compensation" by one man may be in total contrast to the interpretation of another man. This clause will no doubt create a lot of work for lawyers and legislators.

This section of the constitutional accord has raised many questions in my mind. I feel I am a reasonable person and my concerns are also reasonable. I assume many other reasonable people will experience the same confusion and ambiguity within the accord that I have expressed in my concerns. If there are concrete responses to all my questions, I will be satisfied with the immigration clause, but if there is room for diverse interpretations, I would hope the government would attempt to make changes to the document.

We would urge committee members to question the Premier (Mr. Peterson) and the Attorney General (Mr. Scott) on their interpretation of the clauses covering immigration. What do they envision as the worst-case scenario resulting from the application of those clauses as it pertains to Ontario, to Canada? Mr. Fullerton has another area where we would ask for the same questioning procedure.

**Mr. Fullerton:** We would like to suggest to the committee that you quiz the Premier in relation to the clauses dealing with spending powers. Our concerns with respect to the amendments proposed for section 40 of the Constitution Act, 1982, recognize that this is a complex section, dealing as it does with money. We all know that in our society money equates with power. We note the lack of a dispute settling mechanism that involves the legislatures. The money will come from the people. It always does. Governments, of themselves, create no wealth.

Is "reasonable compensation" perceived by the Premier and his resource people to be the amount of money with which a reasonable person would be satisfied? If reasonableness cannot be agreed upon, is it the unanimous perception of all the drafters of the accord that decisions on the reasonableness of compensation will pass to the courts? If this is to be the result, and our interpretation is that it will be, then it is our conclusion that legislative power has been lost, not only by the provinces but by the federal government as well, and this nation will be governed by appointed judges who are answerable to no one for their decisions.

Mr. McDonough would like to comment here on a historical parallel that struck him as an evolution that might be expected in Canada, given the terms of the accord.

**Mr. McDonough:** After the signing of the American Constitution in 1787, there was little power in the judiciary. All it did was simply pass judgement on people and their actions in accordance with the laws. However, this changed in 1801 with the appointment of John Marshall as the Chief Justice of the Supreme Court of the United States of America. His influence as Chief Justice has, more than that of any other person, shaped the constitutional growth of the United States and the future of American law.

His most influential philosophy was the doctrine of judicial supremacy. Today, as Canadians, we must ask ourselves a very important question. Do we want to be governed by an appointed judge or by an elected representative of the people? Do we want an appointed civil servant, answerable to no one, to irrevocably change and shape our future? An old saying comes to mind: *Quis custodiet custodes?* Who guards the guards, or in this case, who will judge the judges? On the other hand, do we want a democratic Parliament, answerable to the people of Canada, to guide us from this point into the next century and beyond?

In this regard, too, Tina expressed apprehensions that are reflected in our brief.

**Miss Laur:** We have seen the example of what judges can do. The abortion issue is a prime example where reasonable people from across Canada are unable to make a unanimous decision with regard to the abortion legislation. Mr. Vander Zalm in British Columbia is strongly opposed to legislation allowing abortion clinics to spring up across Canada. Others are in favour of the Supreme Court of Canada's decision to allow abortions.

I myself would like to see this vital service available to the women of Canada. Let the women of Canada make a choice. Those who are violently opposed to abortions do not have to use the clinics, but those who want the service have it available to them. I find this very reasonable, but my friend Connor does not agree with my position. We are human, different people who have different ideals. Therefore, the majority must rule.

Unanimity is difficult to obtain in many situations. This type of controversy between the provinces and Ottawa may very well affect nominations to the Supreme Court. The federal government, in its interest to have abortion



clinics in Canada, may refuse any names of people put forward by Mr. Vander Zalm who are opposed to the government's position on abortion. This parish-pump system is inevitable. There must be an authoritative voice that will be able to break the stalemate between the federal cabinet and the provinces.

Mr. Fullerton will set out the conclusion we reached on the Meech Lake sections dealing with the judges and the Supreme Court.

**Mr. Fullerton:** Before I get to that, Connor indicated that he had some comments on what Tina said.

**Mr. McDonough:** As Tina said, I disagree with the present abortion laws that have been passed down by the Supreme Court, but it also must be noted that we are both reasonable people and have reasonably discussed this situation and we have come to no reasonable conclusion. We think this is another example of how the premiers will not be able to come to a reasonable conclusion on the same matters, presented with the same facts.

**Mr. Fullerton:** But come to a conclusion they must.

We prefer the pre-agreement parliamentary system where judges adjudicate, legislators legislate and the supreme authority resides in a Parliament elected by the people and responsible to the people. That is not to say that we are opposed to the enshrinement of the Charter of Rights and Freedoms in the Canadian Constitution and the provision that in this area the courts should judge whether these charter rights have been infringed upon on or abrogated by legislation.

You have listened to our arguments, and we trust you have found them reasonable. I will ask Connor to begin our summation.

1430

**Mr. McDonough:** Our theme is that reasonable men and women do not always agree. On the evidence of Canadian history, as we read it, we see the need for allowing an easier amending flexibility in some areas—a flexibility that will allow for the alternative swings to and from centralization that have characterized Canada's evolution; a flexibility that can accommodate, without requiring unanimously constructed constitutional amendments, changes in such areas as Senate reform, judicial appointment, proportional representation and provincial creation. We feel it is not reasonable to assume that unanimity will be achieved in those critical areas now expanded by this accord, areas covering the composition

and role of the branches and levels of government now operative in Canada. Tina also agrees.

**Miss Laur:** Yes, I do. Reasonable people, we suggest, would conclude that such a broadened unanimity requirement will not be met and that this Constitution will become, as a result, unamendable in those important sections, sections where action may well be required to improve the function of government in Canada and preserve the unique nature of our country. Such necessary action should not—we stress, should not—except in a very limited number of areas, require the unanimity specified in this accord. One can appreciate the charterist philosophy that gives rise to many of the accord's provisions, but we must also appreciate the common-law evolution that sees beneficial changes evolving precedent by precedent.

One is fearful of too rigidly listing lest some good things be omitted, and I would not want to omit our final comments, which will be made by Mr. Fullerton.

**Mr. Fullerton:** We would not want to omit good things, but we would want to omit those scheduled annual meetings of the first ministers with their predrafted agendas. They rob from the role, rights and responsibilities of duly elected MPs and MPPs. We can understand the political allure of such meetings for those involved in them. The signing of the Meech Lake accord by the provincial participants in the late-hour, closed-door sessions in the Langevin Block provided, as we have indicated earlier, photo opportunities galore; champagne corks were popped, laudatory phrases filled the air and all was sweetness and light.

As provincial politicians, you know it will not always be so. There will be interprovincial squabbles and provincial-federal scrapping just as sure as God gave Ontario an industrial heartland that is the envy of Grant Devine, the maritime provinces their offshore fishing banks, the west its energy resources and Quebec its distinctness.

When the chips are down, when unemployment is up, when interest rates go through the roof, when tax increases threaten to beggar us all, when the voices of sectionalism and bigotry are heard throughout the land, when planned photo events turn into media scrums, when recriminations are hurled, when fingers are pointed in accusation, when voices are raised in anger and acrimony, that is when a commanding voice is needed, a voice that can speak with decision, a voice that can speak for all parts of Canada. Co-operative federalism is fine, but this accord

calls in too many places for 11 voices to speak for Canada. That may, in the long run, in too many instances, prove to be 10 voices too many.

**Mr. Chairman** and members of your committee, we wish you wisdom in your deliberations, resolution in your findings and courage in the presentation of your report. We thank the committee for its attention and are prepared to answer any questions you may have on the brief we submitted, on our comments today or on our recommendations.

**Mr. Chairman:** Thank you very much. I think it is fair to say that yours has been a unique, if not distinct, to use a common expression, presentation. If nothing else, we will certainly want to send the resolution of the Sarnia-Clearwater issue to the Minister of Municipal Affairs (Mr. Eakins).

**Mr. Fullerton:** We hope you will send it just as an example of the problems that may arise in boundary disputes. If they discover gold 10 miles north of the Saskatchewan border, I am suggesting to you, and if it happens to be right on the extension of the Saskatchewan-Manitoba border and it is just 10 miles north, you are into a real debate under the Meech Lake accord which would never be settled.

**Mr. Chairman:** I think it was a very useful example of some of the principles and issues we are into. I also want to thank you for the written submission you made and I just note for the record the 10 specific recommendations you made in that, which are at the conclusion of your brief.

With that, we will turn to questions. **Mr. Eves**, **Mr. Offer** and **Mr. Breahugh**.

**Mr. Eves:** I think it would probably be an understatement for me to say that you have presented a most interesting, thoughtful and well-prepared presentation here today; probably, I would say, the most thorough of any the committee has received. Various groups have touched on issues of specific concern, but I think you have touched on just about every section in the accord that could possibly have any controversy or ambiguity about it at all. I must commend you for a very worthwhile effort.

You have touched on everything from provincial powers to immigration, the Senate and Supreme Court reform, national standards, national programs, and the unanimous consent of the provinces to create new provinces and resolve boundary disputes. I want to zero in on a couple of areas, though.

Section 16: Your recommendation 8 asks for a specific reference to section 28 of the charter. We

have had several groups before us, especially women's groups, and Professor Beverley Baines from Queen's University, I believe, made the suggestion that perhaps section 16 should protect all the rights established under the Charter of Rights and Freedoms without bothering to enumerate, in this case presently, two or another one or two—perhaps they should all be included in that protective clause.

Do you agree or disagree with such a suggestion?

**Mr. McDonough:** I would agree with that, that all rights of all Canadians should be protected whatever their province would be. I was just curious when I was reading through that and noticed the clause that struck down section 28, guaranteeing men and women equality of rights, and all the women's groups are up in arms over this. But what about men's rights? Men's rights are no longer guaranteed either.

It might be a little prejudiced on my part, but I feel that if the government of Quebec decides for certain reasons that you should have to do something because Quebec is a distinct society, and this will help to propagate the distinct society in Quebec, it could make a law infringing upon your rights, not only women's rights but also men's rights.

**Mr. Eves:** I think the point that you people make also about a well-educated and well-informed public is the biggest safeguard that democracy has. I think your suggestion with respect to process is certainly one issue that this committee is grappling with; not only the process that has gone on so far but just as important, if not more important, the process that will go in the future.

**Mr. Fullerton:** We might point out that in the dying days we discovered that for \$4.95 there was available, from the Queen's Printer, a complete Constitution, but it took us almost five weeks to discover that it was available.

**Mr. Eves:** Do you have further suggestions or ideas that you could make to the committee with respect to process and how you think this should take place?

**Mr. Fullerton:** I have one. In anything I have ever had to do with changes in a constitution or changes in a rule, they usually provided you with a divided sheet of paper saying, "This is what it is now and this is what it is going to be." I am suggesting that had that been done right at the beginning, there might have been greater understanding of the accord. It seems to me that is an easy document to do. Our MP in the area, Sid



Fraleigh, provided us with the document. The library did not have it. We went to the library and asked, and the librarian went to Sid Fraleigh and said, "Can you get us one?" He provided us with one.

When we looked at the back it was great. It seemed to us: "Gee, there are only about five pages there. Surely to heavens you could put together a book that would not have to be shredded, in some kind of a simple form, and say it is available." Then it is the responsibility of the citizen, if he knows it is available, to have access to it.

**Mr. Eves:** I think probably there are another couple of good points you have made that are not in your written submissions. One is the point that any reasonable changes to clarify any possible ambiguities should be able to be made, regardless of what 11 people have agreed to and regardless of the apparently unanimous agreement they have that if you change one comma in this agreement, the whole thing will fall down. If that is the amount of trust there is among the 11 first ministers, I do not think the agreement is worth the paper it is written on to start with.

I think your suggestion that the committee ask the Premier and the Attorney General to offer their analysis of the effect and impact of certain sections would be extremely beneficial to this committee and, quite frankly, I do not think it is one that we have explored to date.

**Mr. Fullerton:** Could I comment there for a second?

**Mr. Eves:** Sure.

1440

**Mr. Fullerton:** We watched with interest the Alliance Québec group which appeared before the committee. That group, as I recall, made reference to some statements emanating from the Quebec government area that raised questions in our minds: "Gee, is that really what Premier Peterson is saying too?" That is why we thought you might entertain inviting the Attorney General and the Premier to, say, interpret.

**Mr. Eves:** The Premier could also offer us some very unique insight as to the thought, the intent and the reasoning behind some of the language and clarify some of those problems for us. Along those lines, the thought has occurred to me also that perhaps Premier McKenna from New Brunswick, who seems to have very real concerns with this agreement, could attend before this committee and outline his concerns for us.

**Mr. Chairman:** Just before turning to Mr. Offer, I would just note that we have two other submissions this afternoon. A number of the committee members will have to leave at four o'clock sharp in order to get their plane, and I want to make sure that we have enough time for the other two. With that being said, Mr. Offer and Mr. Breaugh.

**Mr. Offer:** I would like to thank you very much for this presentation. There is no question it touched on some of the very important matters in the agreement and you dealt with them in a very weighty and thorough way. I very much appreciate the presentation.

The theme of your presentation is that reasonable people might not always agree, and from that it seems that a great deal of your presentation was devoted to the whole question of the unanimity formula. I do not mean to detract from the other very important points which you brought up, but it seemed to me, from your presentation, that that was one issue which you dealt with at some great length.

From your perspective, the unanimity formula applies to things which may have—in fact, I will go further: will have—an impact on all the other provinces. We are dealing with fundamental matters in that particular unanimity formula, the creation of provinces. We have heard from others who were against the unanimity formula and indicated that, "Yes, it will have an effect on each province in terms of dollars flowing." The Supreme Court of Canada, too, is a fundamental institution.

My question to you is, with respect to those matters of such a basic nature in this country, should there not be that type of unanimity where all other provinces will be impacted upon? I would like to just expand upon why you think there ought not to a unanimity formula. I think that, in your recommendation, you have suggested this 7-50 type of process, but in matters of this nature, my question is, why not?

**Mr. Fullerton:** I would like Tina and Connor both to comment on that, but I would like to point out that what we said in the brief—as we recall what we said—is that in the new Meech Lake accord you have taken sections 41 and 42 of the 1982 Constitution and you have melded them. You have taken everything in section 42, which used to be under the provisions of the 30-70, and you have moved every one of those so that they now require unanimity. In the Canadian Constitution 1982, there was a section 42. You are amending that and you are taking all those things

and saying there has to be unanimous agreement in those.

I think what we are saying is, that is too many. Section 41 probably covers those areas in which unanimity is required in order to provide peace, order and good government, but when you begin to include all the others that were in section 42, where there could be some debate and some majority vote, you have begun to tighten it up too much.

**Mr. Offer:** Just before Tina and Connor comment, of course section 42 calls for the establishment of new provinces.

**Mr. Fullerton:** Yes, but 42 did not require unanimity. That is the point we are making.

**Miss Laur:** If it did not require it before, what made them decide that all of a sudden now we need that? It was working just fine before and now they have changed it.

We can see, as we have given the example in Sarnia-Clearwater, it is not going to happen. I do not think that the territories are going to be able to become provinces, because somebody is going to stick his hand up and say no. Someone might not be happy with one way that something is worded or something, and when you have 11 voices that all have to make a decision on one thing, maybe Saskatchewan is sitting up there thinking: "Well, gee, we'd really like that little part of the Northwest Territories there. I don't think I want to sign this, because we will never get it if we make it into a province." Somebody is going to object to it, and I think that if we are in a democratic country, as we are, and the majority rules, the majority should rule on this as well.

**Mr. McDonough:** I would like to comment on the question of when exactly they decided on this unanimity clause, because it was late at night when they finally came out of those closed rooms and said they had reached an agreement. I know myself, when I prepare essays late at night, as time goes on I start to ramble a little bit and I am not as precise.

**Mr. Breagh:** We do that earlier.

**Mr. Offer:** No comment from Mr. Breagh.

**Mr. McDonough:** A lot of contracts are settled late at night as well. You have to wonder if they were getting a little bit tired and, on things they had been a little more adamant before, they decided not to be.

To the question itself, I feel you cannot make a decision with unanimity, because it is not going to affect all of the country.

Also, if all Canadians are going to be affected, I think it should be a majority, not just that all

Canadians should not have a decision that does not affect them, because in time you may have compromises, "OK, we'll vote for this if you vote for that." One Premier will say, "I really want this so I'll vote for this other decision, whether I really feel I should vote for it or not."

It is going to deadlock the first ministers' conferences when all the premiers gather around to discuss things. They are not going to be able to come to reasonable conclusions, because if someone adamantly disagrees, he is going to say, "Forget it, I'm not voting for it," and that issue is right out and people are going to have to start making proposals to him. They are going to start giving him submissions, but they are going to have to give him a little broader ground in other areas to entice him to vote for it.

This is a democracy. Totalitarianism is when you need unanimity and there is this one decision made and it does not matter about all the people. It is a democracy. When we vote, as has been brought out earlier, the majority of the people decide who the MPP for Sarnia is going to be, not all of the people.

Interjection.

**Mr. Chairman:** I apologize. We really are going to be running into some time problems.

**Mr. Offer:** Thank you very much for going on with that.

**Mr. Breagh:** Part of what we are going through is some scrutiny of the process, as well as anything else. I think most of us, in our more polite moments, would say that the process to date has not served us well or was inappropriate or, in our more accurate moments, would say this is the screwiest way to go about putting together a Constitution one could think of. It is not exactly true to say that 11 men locked themselves in a room and did this overnight, but it is pretty close to that.

We are concerned now that part of our job is to try to get a reasoned assessment of the impact of this agreement on as many groups as we can, so we have had learned professors come forward and give us their opinion and other people come in off the street and give us theirs and those who had an axe to grind and those who did not.

I think by the end of this process we will be able to sit and say, "As a package, is this a reasonable thing to do?" But I do feel very strongly that one of the things that must be addressed now is that the process that has been used to date is no longer tolerable in a Canadian society like ours.

Part of the obligation this committee has is to provide some suggestions and to begin the



process of setting up what will happen the next time the first ministers meet. Will it be just ideas out of the blue put on the table and bargained there?

I would advocate, and I would be interested in your response to this, that part of our job is to set in motion now a process for constitutional reform which makes sense to us, which provides as much access as we can, which gives the legislatures in Canada some say on it and which culminates in the first ministers meeting and deciding. From where I sit, this process has just been done backwards. That is the basic fault there.

**1450**

I disagree slightly with some of the tone I thought I got out of your presentation a bit. Others have said much the same thing, that disaster is going to befall. I believe this country can withstand almost anything. It has been through Pierre Trudeau and Brian Mulroney and it will live through this.

**Miss Roberts:** Ed Broadbent.

**Mr. Breagh:** The next big challenge is Ed Broadbent. I thank you for the plug.

If there were no recourse from this, I would be really concerned, but I am aware, as everybody else is, that there are legislatures and the Canadian Parliament to go through, and when we are all through screwing it up thoroughly, there is a court system at work. It is not like we have to design the perfect model because we are at the end of the world and nothing can happen past today.

I have some hope, and I am encouraged frankly by the appearance of you three today, that there are others around who are not going to give up on this system, that the process is not going to stop now and that there are alternatives, ways to change this system. We are part of that way, and it is part of our job to design a process that serves the Canadian people much better than what we have had to date. It may just simply be that in Canada the idea of having a Constitution is new. The idea of people being able to insist on a constitutional right is relatively new. We are all on new ground here.

If I had two criticisms to make of this accord—and I do, and many more—they would be two things. There is not very much vision in this agreement. I find that disheartening. It may be typically Canadian and all of that, but I thought we could have come up with something a little bit more than that.

Second, there is too much finality in here. I would like to see a little more flexibility in here,

because as it stands now, the flexibility that is in here is pretty much limited to one of our legislatures beginning to upset the applecart here. That is one way. Or the courts, of course, will get at it because, no matter how hard we try as politicians, we must admit that in the end we will have to write a law. After we have written it, every Canadian citizen will take it to court, if they want to, and the courts will have to rule on those laws. So the final interpretation is not ours, and we know that.

We do not even have to agree on what this accord stands for. We just have to come to some understanding that we are close enough that we know what we are talking about here.

I would be interested in your comments about the process from this point on.

**Mr. Fullerton:** If I can start, then I will let the other two pick it up. What scares me most is that first ministers' conferences, which are scheduled in there—I saw what happened to Mr. Johnston in Ottawa and I am not naive enough to believe that if I stand up as a member of Mr. Peterson's party, for the sake of discussion, and say, "I don't agree with this document" and there is Mr. Peterson's signature on the back of the document, I have not done something to my political future, if you will. If enough members stand up, the party falls, the House falls.

I just do not like that provision. I did not vote for 11 men to set an agenda for Canada. I am agreeing with you 100 per cent. The process is flawed. The process has to begin with the representatives of the people, all of the people. I would like to see my MPP and my MP standing up and questioning the document. Then it goes someplace. That is my personal reaction.

What scares me is that scheduled annual conference where those 11 men are going to come out and say: "We have agreed. Now we will go back to our particular governments and get them ratified." Mr. McKenna will not have any trouble. Mr. Peterson, with a 95-seat majority, will not have any trouble. Mr. Pawley might. If I could be assured that there was only a one-seat majority in every province, I would be much more comfortable. I cannot ensure that.

**Miss Laur:** Before you get to this actual stage, when we talked about the lack of information, one of the things that scared me a lot was when I came to doing this presentation, I went to school and many different students said, "Why is your picture in the paper?" or whatever. I said, "I'm doing a project on the Meech Lake accord." They said: "What's that? I've never heard of it before."

I could not believe it. People do not know. There has not been enough information given. Maybe it was just the younger generation or people who were not following it, but I found that people did not generally know. They may have heard of Meech Lake before; they did not know it was the Constitution. They did not know what is involved with the Constitution, what it is, what it does for you, that it gives you your rights and freedoms.

I think that is partly due to the fact that there is not enough information on it. You cannot go into your library. I looked in my library for everything I could find on this and there was not a whole lot. You cannot open up a book and say: "OK, here is the Constitution. We get this right and that right," and everything all down and the amendments made to it. That was a real scare for me.

**Mr. McDonough:** As Tina said, when I told people at school that I was going to give a brief on the Meech Lake accord, they said, "Oh yeah? That's really neat. So when are you going to Meech Lake?" I said, "I'm not going there." They said, "Where is it anyway?" I said, "It really doesn't matter," and they would say, "Oh, OK." That would be the extent of their questioning.

I found most people there are totally uneducated about this. These are the people who are going to have to live with the decisions that are brought about by the Meech Lake accord. There has to be greater accessibility to information on the Meech Lake accord. There has to be greater education of the public and the youth in society today about the Meech Lake accord.

**Mr. Chairman:** You have really underlined one of the aspects of why hearings such as this are important earlier in the process, and that is a straight public education process. I know we have often talked about how, if you like, at the culmination of the 1982 process, some people had so much information they were probably sick and tired of the whole thing and just said: "Please sign it. Do whatever, but let us end all of this." We certainly have had the occasion where, I think, some people may have thought Meech Lake was an environmental problem as opposed to—and perhaps it is.

**Mr. Breough:** You said that, not me.

**Mr. Chairman:** But it is true that in terms of public awareness of just what is there, it is not the same as in a number of other instances.

On behalf of the committee, I thank all of you very much for coming today. We have very much enjoyed your presentation. The thoughts and

ideas that you have put forward are, as in so many cases, from a number of different perspectives, and I think particularly of the one that relates to men and women of good will, of common sense, not always being able to agree. You ask, "How do we try to work our way through that?" So thank you very much.

**Mr. Fullerton:** Thank you very much, Mr. Chairman. There are just two things we would like to say. First of all, if it were possible to change Meech Lake to Constitution Lake, we would love that. We think it has a better ring. The other thing is, if you happen to run into Mr. Radwanski, who made the report on education, I would like him to meet my two students.

**Mr. Chairman:** Hear, hear. Thank you very much.

I might then call on Donn Korbin to come forward. We have distributed a copy of your submission, Mr. Korbin, and welcome you here today. So that we can make sure to give you plenty of time for your submission and questions, I will quickly turn the microphone over to you. Welcome.

#### DONN KORBIN

**Mr. Korbin:** Thank you, Mr. Chairman, and thank you everybody for giving me the opportunity to speak to you today. I would just like to introduce myself briefly. I provided a statement to the chairman on my qualifications. For several years I worked as an economist. I have worked as an economist in Saskatchewan. I have worked as an economist in the private sector in Ontario. I have worked as an economist for the federal government in the Department of Energy, Mines and Resources.

For the last several years, I have worked in a managerial capacity for a southwestern natural gas utility and have provided advice to the Ontario Energy Board on matters of rate design, contract carriage and storage of natural gas in Ontario. I have appeared several times before the Ontario Energy Board and I have also appeared before the National Energy Board as a witness in the recent natural-gas-surplus determination procedures.

I think it is clear from my qualifications that I cannot bring you legal or constitutional expertise. I only bring to you my concern as a citizen with the principles that have been embodied in the Meech Lake accord.

**1500**

I think, perhaps somewhat uniquely, I also bring some practical business experience from an industry which has experienced the conflicts and



problems that result from the application of provincial rights in the area of natural resources. As some of you may be aware, the natural gas industry is going through an enormous structural change with deregulation, and there have been numerous controversies over the implementation of deregulation, over the access of eastern Canada to natural gas resources in Alberta and the question as to what extent Canadian needs for energy resources should be protected before such natural gas resources are exported to the United States.

I have also seen, as a result of provincial powers, an agreement called the agreement on natural gas pricing between the federal government and Ontario being transformed into something you would not expect from the reading of the agreement. Deregulation has been transformed into something very different, with some very serious consequences to Ontario and other people in eastern Canada.

My own experience with intraprovincial trade and in an industry which depends on intraprovincial trade leads me to question very seriously the practicality of greatly expanding provincial powers. I think one of the thrusts of my submission will be to suggest to you that this committee should consider very seriously these implications before you agree to such a document.

What I would like to do with the document is work through it briefly and highlight what I think are the key points and then be available for questions.

In my introduction, I put to you the position I hold, that the Meech Lake accord should be rejected in its entirety. I believe that a straightforward reading of the accord would lead you to conclude that it is self-contradictory; I believe it incorporates political principles which conflict with those underlying the Charter of Rights; I seriously question the incorporation of expanded unanimity agreements; and finally, I do not agree with the philosophy underlying the accord.

In outline, I will contend that the accord incorporates the following two conflicting political principles. The first principle is that Canada is composed of equal provinces and the second principle is that Canada is composed of two nations, French-speaking Quebec and English-speaking Canada. I believe it is the conflict between these two principles that leads to the ambiguities and different readings of the accord.

I also believe that the accord incorporates within the Constitution, in a pre-eminent position, the right of language-based communities,

perhaps even the obligation for these language-based communities to override individual rights in order to achieve their collective or communal goals. As a citizen, I object strenuously to this very great limitation of the Charter of Rights, which I regard as one of the fundamental achievements of the first round of constitutional negotiations.

Finally, as I mentioned, the charter imposes unanimity provisions, particularly in reference to the powers of the Senate. I do not believe the powers of the Senate are such that we would want at this time to incorporate unanimity provisions in order to change them.

If I could turn to section 2, it essentially tries to make the argument to you that the accord does incorporate these two conflicting principles: provincial equality and the distinctiveness and uniqueness of Quebec. If you read the accord, it seems to me that it states three fundamental things: first, that the existence of French-speaking Canadians is centred in Quebec, and this constitutes a fundamental characteristic of Canada; second, that Quebec constitutes within Canada a distinct society; and third, that the role of the Legislature and the government of Quebec is to preserve and promote the distinct identity of Quebec.

I submit to you respectfully that this amounts to recognizing Quebec as a French-speaking nation within Canada and that Canada is composed of two nations, one French-speaking and one English-speaking.

To support this argument, I look towards the definition of a nation provided in the Shorter Oxford English Dictionary. Basically, the definition of a nation is, "A distinct race or people, characterized by common descent, language, or history...organized as a...political state and occupying a definite territory."

The accord recognizes that Quebec and its people are distinct from Canadians elsewhere in Canada. The accord explicitly recognizes the distinction of language in Quebec, explicitly provides for a role of the Legislature and government of Quebec to promote a distinct identity and recognizes that Quebec is a territory upon which French-speaking Canadians are geographically centred. The combination of language, territory and government would seem to provide a foundation for an interpretation that Quebec is indeed a nation within Canada.

I also add to these very explicit recognitions of the distinctiveness of Quebec the implicit recognition contained in the words "distinct society" and "distinct identity." I think this broadly

worded clause demands that we ask how the courts may view the constitutionality of new legislation if these amendments are in fact adopted within our Constitution.

Society can be defined as a "system or a mode of life...a harmonious coexistence...for mutual benefit" or an "aggregate of persons living together in an ordered community." In the future, when accord is required to determine the constituent elements of a distinct society that may be preserved and promoted by either Quebec or federal legislation, I submit to you they will have to consider Quebec's distinct history, ethnic composition, culture and institutions as well as its language, for surely these are the measures of what constitutes an ordered community and a mode of life that distinguishes a society. In essence, I think Quebec has been provided with the constitutional safeguards necessary to promote the development of a distinct nation within Canada.

I respectfully suggest to you also that if you accept those particular three principles of the accord, it follows that the province of Quebec is different from the other provincial governments. We have the fact that the Legislature and government of Quebec are charged with preserving the French-speaking nation in Quebec, and this will make the provincial government of Quebec unlike all others.

I think the distinctiveness of the role of Quebec comes out when you compare the role envisioned for the legislatures and the governments of English-speaking provinces. The English-speaking provinces are not charged with preserving or promoting a distinct English-speaking society or societies. Their obligations are in fact somewhat vague and basically refer to population, the centring of French-speaking population in the province of Quebec and the centring of English-speaking population in the remainder of the country.

It is not my contention that Quebec is not a distinct society, but I do ask, are there not other distinct societies in Canada? Is not Alberta a society distinct from Ontario? Is not Newfoundland a society distinct from Ontario? Yet, if we accept the fact that they are, we have to ask ourselves, why do they not have a constitutional obligation to promote and preserve their distinctiveness? Why is it the distinctiveness of Quebec that merits constitutional and political recognition? I submit to you that the only answer I can think of is that "distinct society" are really code words for "distinct nation."

I have argued to this point that the accord incorporates the principle that Quebec is a distinct nation. It is not my intention here to debate the merits of that position, but what I would like to do is explore the logic of accepting that position. Let us assume for the moment that is true. What sort of constitutional arrangements would follow from that? What constitutional arrangements do not follow from that?

I think it follows, first of all, that the province of Quebec should enjoy special status and that Canada should be viewed as a confederation of English and French Canada, each with its national identity. If so, if you accept this political vision of Canada, it would follow that the political framework of Canada would need to be renegotiated and a new framework presented to the people of Canada.

#### 1510

Equally important is what is not implied. Equality of provinces is not implied and, in fact, this contradicts the acceptance of two nations and special status. For this reason, I submit that the accord is self-contradictory.

I would also like to submit to you that the Charter of Rights and Freedoms should not be subordinate to the communal rights of Quebec. It does not follow from the acceptance of these principles that the charter should be subordinate.

Of course, we have not had a debate in Canada as to whether Canada is two nations or 10 equal provinces. Rather than openly acknowledging these issues, I think what has happened is these conflicting principles are harmonized in practice by providing each province with a set of rights that are substantially widened, substantially enlarged, and basically unnecessary and inappropriate.

This expansion of power can be found in the unanimity principle in the amending formula, the nomination of Supreme Court and Senate candidates by provincial governments and the extended rights to compensation should a province opt out of a national program.

I have argued that in principle this is not appropriate. I would also argue that at the practical level we have to ask ourselves whether we desire the provinces to have this expanded role provided by the accord. I think my answer is clear, they should not.

I would now like to turn to section 3, which begins on page 13, where I deal with the Meech Lake accord and the Charter of Rights and Freedoms. Basically, in this section I argue that the Meech Lake Accord incorporates a distinctly different political philosophy than underlies the



Charter of Rights. It incorporates a philosophy that we are a corporative state of distinct communities, and that individual liberty is a subordinate consideration to the rights of these communal groups.

I think this is a retrogressive step. I already believe the Charter of Rights is limited by the "notwithstanding" clause. I believe the "notwithstanding" clause is an undesirable and unfortunate clause in our Constitution. But I must also say I believe that by putting the clauses of the Meech Lake accord into the Constitution we have an even more reprehensible limitation of individual rights and liberties incorporated into our Constitution.

I also believe that because of the conflicts between the political philosophy of the accord and the political philosophy of the charter, our courts will face perpetual challenges, with one party taking the position that the rights of the charter should apply and the other party taking the position that the rights of the charter are subordinate to the Meech Lake accord, and we will thus be putting ourselves in the hands of a Constitution which is inconsistent and contradictory.

I then ask myself, if you like, why was it necessary to subordinate the Charter of Rights to the "distinct society" provisions of the Meech Lake accord? Once again, the only answer I could come up with is that there was a reluctance to come to grips with the fundamental political issues as to whether we were two nations or 10 provinces. I think that by subordinating the charter we are essentially moving in the direction of two nations. An explicit recognition of the uniqueness of Quebec and its special status would perhaps allow us to avoid subordinating the Charter of Rights to the "distinct society" clauses.

Earlier in these proceedings, it has been suggested that it would be desirable that section 16 was amended to protect all charter rights. I certainly would endorse that, but I do not believe that it could really be accepted by the signatories to the accord. I believe that would be contradictory to the principles embodied in the accord.

The final issue I would like to address with you today is the principle of unanimity. I think the principle of unanimity has obviously generated a lot of concern. It is a very stringent requirement and one we should not enter into lightly.

I think the accord has greatly increased provincial powers, and in combination with the expanded rights to compensation for any dissenting province, I think we have practically

eliminated the possibility of a constitutional reform that may increase the power of the federal government in the future.

I also believe the Meech Lake amendments are such that it will be more difficult to remove the "notwithstanding" clause from the Constitution, because I believe the "notwithstanding" clause would always be a clause that would be negotiated away in a log-rolling type of agreement.

I would like to address the question of unanimity where the Senate is concerned. In our parliamentary system, the existing powers of the Senate in practice are at variance with the legal powers of the Senate. Senate reform has been discussed extensively, yet no resolution has occurred. Surely it would be most imprudent to require unanimous approval of changes to the Senate when we have a situation where practice is at variance with law. One province, combined with an intransigent Senate, could in fact create a constitutional impasse.

Finally, I would also like to comment on the legitimacy of these proposed changes in light of the process. In this section I guess I have used some rather harsh language, but it expresses my disaffection with the process. Eleven men did negotiate a fundamental change to our Constitution behind closed doors and they have presented this accord as a *fait accompli* to the Canadian people.

Normally, when government takes action, the citizenry can throw the government out if it does not like these actions, but the combination of these fundamental changes and the changes to the amending formula requiring increased unanimity result in a situation where in fact I think it would be impossible to change the Constitution should we decide these changes embodied in the Meech Lake accord are unacceptable.

Thus, in conclusion, I would like to urge this committee to report back to the Legislature that the Meech Lake accord should be rejected.

I think one of the aspects of the Constitution is that there are many unintended consequences. We cannot envision today what may be argued about the Constitution five, 10 or 50 years into the future. All we can do is set forth principles that we would be satisfied could be used to provide a just resolution of conflict in the future.

I submit to you that the Meech Lake accord does not pass this test and therefore cannot be approved by the Legislature.

**Mr. Chairman:** Thanks very much for a very clear presentation. We have your full text, of course, which expands on a number of the points

that you made, and I think we will move right into questions to make use of the time we have.

**Mr. Eves:** I will try to be brief, especially in light of the time constraints we are operating under.

I think all members of the committee share your concerns about the process this proposed constitutional amendment has undergone, and we will certainly be addressing that in our deliberations.

I gather that even if your concerns about charter rights could be satisfied—in other words, the all-encompassing clarification amendment to section 16 that has been suggested by several groups—and even if we could satisfy you with respect to the unanimous-consent principle in its various places throughout the proposed Meech Lake accord, you would still be against the agreement on the fundamental basis that the “distinct society” clause presents to you. Is that correct, in essence?

**Mr. Korbin:** That is correct, sir.

**Mr. Breagh:** I would like to run through some of the points that you made and get your response.

I understand how this accord was put together perhaps better than I had, say, an understanding of the 1982 round of negotiations, where there were a good many attempts to address what should be in the original Constitution of the country, in that this round is a little more the down-to-earth political reality of a nation being expressed in its Constitution.

## 1520

I view it in quite a different way than you do. I see that there is a series of subtle shifts—that is the way I would put it—in acknowledging that provincial governments today are much different from what they were even a decade ago, and I believe it to be a political reality that sooner or later has to be addressed. The Legislature of Ontario is a very different animal now from when I first became a member and, in terms of history, that is a very short period of time.

At some point in time the Constitution of Canada must reflect the political reality that there is a change in the nature of provincial governments, which means that the traditional relationship between the federal government and the provinces has to be reflected some time. It may not have done that in a way that you would like, but I think that is inevitable. Whether it happens now or 10 years from now, that is going to happen. I think in part it is a recognition too that even though it was said that the federal govern-

ment is paramount, one provincial government managed to stand the government of Canada on its ear for quite some lengthy period of time, so the political reality was demonstrated.

Second, I am one of those who advocate that in some way, when we are finished with this, the supremacy of the Charter of Rights must be established. As a committee, we can move an amendment. We could do a referral to the Supreme Court and get a court decision that does that, or we could simply delete those references in this agreement that we think infringe on the Charter of Rights, but in some way they must be put in their proper positions. Everyone says that. No one is satisfied with the politicians saying that, so I think that some further redress is required.

I am not as taken aback by the unanimity requirements as some seem to be. I read very carefully the fine print, which restricts the occasions when unanimity is required. My reservation about it tends to be that if we had resolved, for example, the problems of aboriginal rights and the territories, we could probably move with ease to the requirements in this agreement that actually need unanimity. I just think it is a little bit premature, and some other things have to happen before I will be comfortable, or as comfortable as I would like to be, with that.

But I do think, when you get right down to it, that if we do not all agree that fundamental changes to a limited number of federal institutions are necessary, it is not going to work. If you say, “Seven provinces and 50 per cent of the population say we ought to change the Senate and the rest of them do not,” and you proceed to change the Senate, you have yourself some very real problems. If everybody does not agree that this is the right way to go on these limited items, it is not going to work anyway. It is kind of like the father saying, “We are all going to get in the car and go to the movie tonight,” and someone else in the family saying, “But I am not going to get in the car.” It does not matter what the father said. The whole family is not going to go to the movie that night.

So I think that in many ways practising politicians will have an easier understanding of this process than a lot of other people. There is a lot of crass politics in this, and although we say that 11 men hid behind closed doors and drafted this, I do not think there are very many people who practise the art and science of politics these days who do not understand what happened behind those closed doors. What we are dying to



see is what actually did happen. We would like to see all the intentions, the players, who made the moves and what the compromises worked out were. Of course, one of the great drawbacks of the political leaders going behind closed doors is that they may actually have allies out here and they will never meet them, because we are not privy to the circumstances.

I am not as fearful of this document as many are. Obviously, you do not like it very much either. I think there is still some hope in here. I do not like it as a deal, because there are too many pieces missing; there is too little understanding in the nation. I would advocate, for example, that this deal will not work, no matter what the premiers and everybody else said, unless the Canadian people finally have some understanding of why they did these things. There is a whole lot of explaining that has to go on. I would be interested in your response to that.

**Mr. Korbin:** I think I agree with you in part, sir, but perhaps where you do not fear the unanimity provisions being introduced, I see parts of the Constitution having been modified and the unanimity provisions tacked on. The provinces now are instrumental in nominating Senate candidates. It could be argued that over time the Senate will become very much an instrument of provincial politics and the politics of provincial governments. Obviously, with the legal powers of the Senate, the provinces and their politics will play a very significant role in determining the attitude of the Senate towards new legislation in Canada.

We all recognize that the Senate has legal powers and it has practical powers, and whenever the Senate exercises its legal powers we are talking about constitutional crisis. The Mulroney government experienced this in the question of the patent law concerning—

**Mr. Breagh:** The drug bill.

**Mr. Korbin:**—generic drugs. So we have introduced this unanimity requirement in order to change the relations of the Senate as an institution in a situation where I think you could safely predict that one day you will end up with a very serious constitutional crisis. You could have one province and the Senate basically stand off the rest of Canada, at least in a legal sense.

If a board of directors of a company entered into a contract where you knew the practice was at variance with the old contracting provisions and where you have multiple parties involved in negotiations, I think the board of directors of a company would be viewed as negligent and culpable 10 or 20 years down the line when that

came back and resulted in an impasse. That is why I say you cannot possibly introduce unanimity provisions regarding the Senate when you do not have even minimal agreement on what the role of the Senate is in contemporary Canadian government.

**Mr. Chairman:** Mr. Offer with one question. I apologize, but our next witness is here and some people are going to have to leave at four.

**Mr. Offer:** With respect to your position of a two-nation type of theory, you have used and brought forward a particular portion of clause 2(1)(a) "that the existence of French-speaking Canadians, centred in Quebec...constitutes a fundamental characteristic of Canada." That clause, of course, says a great deal more than that. It does not say just that, but also goes on to say "but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic." I am wondering, keeping in mind those parts of the section, how that impacts upon your theory of the two nations.

**Mr. Korbin:** I do not think it negates my theory of two nations. I think, in practice, what those sections recognize is that there is a minority group in English Canada of French-speaking people and a minority group in Quebec of English-speaking people. I think what it says is that in order to preserve the distinctive characteristics of Quebec, its French-speaking nature, its geographic centre for all French-speaking Canadians, the rights of English Canadians in Quebec will be subordinate to the communal rights of the French-speaking majority in Quebec.

**Mr. Offer:** What it might be saying is that a fundamental characteristic in all of Canada is that there are in existence French-speaking and English-speaking Canadians in all of Canada and we are recognizing that in all of Canada; that we are also recognizing the fact that the French-speaking Canadians are centred in Quebec but are elsewhere in Canada and English-speaking Canadians are centred in the rest of Canada but are also in Quebec; and it is dealing with it in a very full way, but just recognizing, indeed, a fact of this great country, actually.

1530

**Mr. Korbin:** If that were true, I would ask in return why the provisions of the Charter of Rights and Freedoms, with respect to a bilingualism which guaranteed the rights of French Canadians to be served in their language in English Canada with respect to their federal government, did not

more fundamentally and more rigorously protect the rights of all individuals to be served in the language of their choice and allow them as individuals to preserve their own distinctive identity in whichever way suited them. That is why I feel that this in fact is a retrogressive step from the original clauses of the Constitution.

**Mr. Chairman:** I thank you for your presentation, and also, I think, for your preambular remarks. One of the areas that has come up on a couple of occasions has been the reference to interprovincial trade and various things that may or may not be happening to that. You have also raised a number of questions to which we really do not have any easy answers, but ones that we are going to have to reflect upon. We thank you very much for coming today and sharing your thoughts with us.

I would next ask Chief Charlie Shawkence of the Chippewas of Kettle and Stony Point Indian band to come forward. I welcome Chief Shawkence. I might just note that if a few members disappear at four o'clock, it is not intended in any way as a slight. They have to get out to the airport and catch a plane. I do not want to take any more time, but will turn the microphone over to you and let you make your presentation, and we will follow that up with questions. There will be representatives from all parties here after four o'clock, but there will be a few who will have to quietly slide away. I turn the microphone over to you and bid you welcome to our deliberations.

#### CHIEF CHARLES K. SHAWKENCE

**Chief Shawkence:** [Remarks in native dialect]. That simply means thank you, shake hands, how are you and it is a nice day.

I did not prepare anything, like the rest of my group. You have heard my grand chief speak. I have not looked at their statements. You have heard my regional chief, Gordie Peters, speak. I watched what I could on TV. I got leave from the hospital today to come here. It is quite interesting.

I have lots of thoughts. I am going to speak from the heart here. I printed up a few things, if you want to pass them around. I just had these done; they are just topics I would like to speak on here. By the way, the secretary got mixed up and I wound up trying to find 195 Dufferin Avenue. Nobody told me where to come, so that is why I am late. I apologize for that.

**Mr. Chairman:** That is quite all right.

**Chief Shawkence:** Bad communications.

The topic for discussion is called Canada's Constitution. I shall begin by saying I think it

should be labelled Canada's conscience, because I have been told by the elders the things that are happening. The more I have been told, the more I research—with this oral history, you are only told about these things—and as I research, I find there is no variance in what my elders have told me. You cannot change history. That is what I want to emphasize, how you guys have changed history with the coming of the Europeans.

Traditionally, the Indian people are the best statesmen; they are the best politicians, as you know if you read history. We treated the Europeans well. I think if it were not for the Indian people, a lot of you would not have survived. That is all I want to dwell on. It will give you something to think about. That is why I call it Canada's conscience, because if it were not for us, you would not have a Canada today.

I was going to begin by asking all you people—I watched this and it is quite a forum—what your thoughts are, instead of you asking me. It is always on us to prove ourselves. We do not have anything to prove. It is you who are trying to make us prove something that we are not.

These are the things I ask. Why should we always have to go around proving ourselves in the courts of law? We have been portrayed as the bad guys. You enact laws and things of this nature, and everyone I meet says, "Oh, there's another one of them Indians." There are no other words I can use to describe it, and it makes you wonder.

So I think about these things and I think it is good all these good things are happening.

There are some things I want to remind you of. The Indian people went over to England. I was one of the chiefs who chose not to go there. There was a statement made there by Lord Denning which few politicians or judges even know about, and I think you should be reminded of it. He said: "You've come over here. There is nothing we can do here. It is Canada's duty. You go back there." I was looking for his statement, because I have a transcript of it. He said, "You go back to Canada." This piece of paper will tell—"As long as the river flows, the grass grows green and the sun shines, so you can withstand any onslaught that you may come against." Those were his words. It is there. I have it someplace.

Anyway, I have to commend some of you fellows, particularly this man sitting here—Mr. Eves, is it? I liked your statement, sir. "Ten wise men," you said last Friday somewhere. That is



what brings you to ask, what right do these guys have to decide on the fate of everybody?

In our council we have great discussions, great debate, and on what we think is right we will have a sort of referendum and send it out to people: "Is this what you want?" If we get an answer back, "Yes," and the majority wants that, that is the way we go in our council. We go with what the people want.

I guess there are things that I am very worried about. You hear about the free trade agreement. We signed an accord, a memorandum of understanding, in 1786—that is, the pre-Confederation treaties. That was after the royal proclamation. It is the very foundation of Canada, the royal proclamation of 1763. Then we had the Indian Act and we had the British North America Act, the BNA—which ever came first—and now we have the Constitution, which brings us to why we are sitting at the table today.

I could go on to the Indian wars from about 1750 or 1760, because I have tried to read all this stuff, I am very curious about what my elders have told me. As I told you before, as surely as I sit and research, there is absolutely no variance at all in what I find in the archives. Like everyone says, "The courts may have their day, but the historians will have their say."

You have to understand my feelings here, because in my time as chief I have approached a lot of federal members. I have been put on the civil disobedience list, and I hope with my appearance here today I am not being followed around by the Ontario Provincial Police civil disobedience crowd. I have been put on that before. I am just saying what I think. Just because I spoke some harsh words to the minister at the time—I think his name was Chrétien—they followed me for two years, for what reason I do not know. I was speaking up for my people.

When we get into these wars of 1750 to 1760 and stuff like that, that is where many people went back and forth, tried to take over—the Europeans—and that leads us up to, you know what happened in 1760, the British North America Act, all this stuff and all these changes.

Then the thing that really disturbs me is the royal proclamation. In order to take over these reserves, which were set apart for our use and benefit in posterity, somehow they seem to enact legislation which supersedes what is our very foundation. It is like—I do not know how to describe them to you, because I have very limited education. All I know is from experience.

Anyway, in 1951 they decided to amend the Indian Act, and these great white fathers that had

been in the Indian Act, sort of went together with the province and said, "We will amend this Indian Act so provincial law will apply on the reserves." To me, that is expropriation or appropriation of your rights. In order to have us surrender, you have to have a vote by the consenting members of the band, or the tribe, or whatever. This never took place. And before then, we trusted the Indian agent, or whomever it might be, to do whatever was best and then they created a ghetto or something for us. We trusted them and they said, "You cannot do this and you cannot do that." They took away every bit of culture we had. I could go on and on and speak to you for two hours, I imagine. But these are the main points.

#### 1540

They amended the Indian Act. These are things that bother me. Then there is free trade. I hear Mrs. McDougall on the federal side talking about free trade. In the pre-Confederation treaties we never gave up our rights in these things. That would have to be answered to within the province. What is going to happen with them? Is this going to supersede these things by a royal proclamation like we were talking about? You have heard section 91, section 24 and all of that where we have our rights entrenched.

Then we go on to 1944, which you all know about, and Camp Ipperwash. They appropriated our lands, even before they came to see my members. I have copies of the letters six months before they even proposed it to the Indian people. It says: "better to relocate a few straggling Indians and lump them together. They will be better off in the long run." Here we are. We are still here. The war is still going on, I guess. That was in 1942. They promised, "We will give you the land back after the war is over." To me, these are the very things we are faced with.

I just do not know where to begin. There is so much. I guess the environment concerns me. I am very close to nature. I am concerned about the quality of the water. I have watched documentaries. I have satellite, so I watch all this stuff. It is very interesting. Once it really struck me about the quality of the water. There was a documentary about a captain who is going to retire. He was driving one of the biggest grain carriers from up north. He was going down along the river. They asked him, "What about the water?" He got down past Detroit someplace. He said: "Well, let me tell you what my thoughts are. I docked my boat and threw out the anchor rope. Along came this rat and ran up the rope. He did not even wet the hairs on his belly when he ran across the water."

Those were his thoughts on the water. So, I guess that says it all.

If you read history, some Indians down in the United States go back to the 1600s. When they took all the treaties and surrenders and bought little pieces of land from the Indians, they gave them a little bit of money. "You will be neighbours like us. Be farmers. We will help you and give you little lumps of money." This is what is happening. I see a repetition of that by the federal government, not doing enough to really do the job. They just take a little hunk of land from you and give you a little bit of money. You do not succeed. You do not have the expertise. You go back and say, "We need some more money. We do not know how to farm." They say, "Well, give us some more land and we will give you some more money." So, in sum, they took the whole damned thing away from them. They have nothing over there.

I read the treaty through. I see where they surrendered their rights to the American boundary in 1807, and 1807 was the year that Tecumseh decided to go with the British. For the historians here, I have forgotten to bring the medals, but I have them in the car. On my side of the family, I am a direct descendant of Tecumseh or the Shawnee family. The medals that they cannot find I have in my coat pocket outside in the car, if you want to see them, that King George presented to them. I have them here. They have been passed down, and they mean something to us.

As I say, 1812 was the very foundation of where Canada really started. I think it was called Upper Canada, was it not? They fought these great wars. They beat the Indians up in Mackinaw and beat the Americans who came down to Detroit and the Iroquois. They all helped the British—Detroit—they went over to Queenston and beat the Americans back over there. Just what would it be like if it was not for those people who formed this great Canada we have.

The 1965 welfare agreement: I will not speak too much on that. I can remember the days, sitting in a council meeting in 1967, when a former member of Parliament came right out with: "Accept this. Nothing will change." Now they are taking means tests; they make the elders sign their land away, their rights, where they do not have to declare their earnings. Some of them have a little extra income; it is very little. They supersede everything we have. I will not get into it, but we are going to make some recommendations to the social—I do not know who the

minister is, but we are preparing a brief which we would like him to see.

Fishing and the select committee on land drainage have ties to each other. Back then, the Progressive Conservatives formed a select committee on land drainage. I guess this involved fishing. It used to be called lands and forests, but in 1972 they had a committee. They roamed all over Canada, they went to New Zealand, they went to the United States, they went to the United Kingdom, and over there they picked up a process from the English people, where they give title; they had game wardens and stuff and they called it the Ministry of Natural Resources.

Their report came back, and I believe this is where all this encroachment on our rights came along. Somebody in the back rooms of the Legislature at Queen's Park decided in 1972 that they shall make this new minister called the Minister of Natural Resources. You guys are all members of the provincial parliament, you know how things go on in the back rooms. I have been going up and down there for years—it is not what you see in front; it is behind where the deals are made.

I know all about it, believe me. I have been going there since 1966. I have talked with guys and I sit in the back rooms. I guess you call it lobbying or whatever that might be. I think I know the system after working on the council. I will not say the ministers or these guys sign papers, it is done by somebody else; he signs things he probably does not know he is signing. Sometimes as chief I have to get letters out too, so that is all part of it.

Getting back to this land drainage, somewhere along the line they decided, like over in England, the old colonialism came out: "We shall control everything." That is when they started charging my people, in 1974, and we have been fighting over fishing rights with the Ministry of Natural Resources ever since.

The Ministry of Natural Resources, in its report to parliament, said, "We shall have control over everything." If you guys go back and look at it, that is where I think this whole business began—Then it said, "Reserves are separate and apart." The former Minister of Natural Resources, René Brunelle, admits there is some unceded land out there. I presented a claim on behalf of the Chippewa Nation back in 1980-81. They wrote me; I have all the letters here, stuff that I relate to.

There are some other things I have not written down here, on this Meech Lake accord, all these things. In my travels, I met a coloured fellow one



time and I took him out fishing. We were sitting and talking about all the frustrations I go through. He said: "My good man, you know what I call that? I call it exploitation of illiterate men." I did not know what it meant, but I looked it up and I have a good idea now. Anyway, this is what it is all about.

One recommendation I would like to make to you people is that when you go back to these 10 wise men, or 11 as you call them, when you print this, because there are things printed in what we call 75-cent words; we look them up in the dictionary and if there is one meaning, there are five of them. What is the real meaning? Print it for we people who do not understand all those words—I bet there are hundreds, thousands and millions across Canada who do not understand it. We want to know in plain, simple English what they are doing, because I do not think people really know what is going on. I have that feeling right from deep down inside. Not too many know really what they are doing.

**1550**

I heard you say something about some judge. They make laws and, on the second recommendation, they become the laws of this land. I heard Attorney General Ian Scott, last December or a year ago, before they had the first ministers' Constitution, there was a meeting at the Westbury Inn and he was a guest. He said, "Boys, it is better to take half a loaf of bread than nothing at all." I do not forget those words.

I had an occasion to meet him last June. I did not bring my daily book with me where I make my dates, but I met him in Petrolia, Ontario. It was a really hot day, a Friday afternoon, and he was coming from in from somewhere. So I sat there and waited for him. We talked about this fishing problem. We talked about the same things I am trying to refer to—the royal proclamation that you cannot get these lands unless there is a surrender and all these things.

The thing that really disturbed me the most was when we got talking about fishing and we got to fines. He said, "How much fine do you pay?" I said: "I really do not know. The last fine that a person paid when they were convicted was around \$300." He looked at me and said, "That ought to buy your licence." What kind of attitude is that? To me, I am wasting my time talking to this man.

But I learned that he is trying to do something. He said, "How am I going to get the message across to the public about history, the true meaning?" I guess as I say to you, these hearings should be beamed into every classroom in

Ontario as an educational process to get really through to the Canadian public, because we have been portrayed as bad guys, and that is what you are doing in your courts.

Yesterday, my band members went to demonstrate outside Osgoode Hall. I do not know what happened. The Batchewana band won a case and the province appealed, because we beat you at your own laws. I do not know what the case was, I know nothing about it, but the decision is coming down today.

Our recommendations to provincial judges, that sit in these provincial courts, because I have been there—we have spent thousands of dollars on lawyers' fees, research, historians, people, telling them from the very beginning about history. They say, "All I know are the laws that exist today." They do not know about this. If they find a case where someone has been found guilty, then it is "I will refer to that judgement. I will find you guilty."

So I say to the Attorney General, go back and teach these provincial judges history right from day one so they will understand it and get the Indians' perspective side of it, so that they understand. I know because of my band members.

You have heard about the raid on Kettle Point. I heard you mention it. I will speak to that. I want to ask you one question and I do not care who answers it. What day was the provincial election last year?

**Mr. Chairman:** September 10.

**Chief Shawkence:** OK, that is not hard to remember, September 10. I sat at home with my television and I watched Premier Peterson saying over the TV—and I have asked for his speech at different times, here and through Queen's Park, but I cannot get it. I went to CFTO TV and they said, "We do not keep track of that stuff." But I remember the high points of his speech. He said, "There shall be no minority group overruled by a majority Liberal government."

On September 27, 1987, my band members were overruled by the provincial police out on a lake, which we think is our own right. The Ministry of Natural Resources, with high-powered rifles, American game and conservation officers—they had bullet-proof vests on—intimidating our people. Is this an indication of what is to come for my people?

I think that is about all I have to say. If you want something, I will put this on paper. As I say, I have been in hospital for over a week. I just read history and it comes from here within, the things I see, frustrations. I really feel like I do not

have to answer. You are here to hear a person's views, and if I offend you, I make apologies to no one, because I am speaking for my people, Joe and Gordie—I have seen the men crying at the last first ministers' conference when they failed to get through: strong men. They know what they are doing.

**Mr. Chairman:** In terms of any questions we do have, it is really to try to help ourselves in—

**Chief Shawkence:** I forgot. I had better mention to you all the duties I have as chief. There are about 1,200 of us in the Kettle and Stoney Points band. I am also the Grand Chief of the southwest district, of which I am chairman or whatever you call it, vice-president of the seven Anishnabek nations, who probably total about 1,000. I am chairman of the seven-band community futures. I also have a little business I run in the summertime. I have a little corporation where we bid on jobs and try to be competitive. We train our people in whatever skills they want to know.

This is no place to tell you that the Department of Supply and Services makes it pretty tough because of the type of services. You have probably heard that we bid on jobs and lose out by \$1,000. It is not what you know, it is who you know. I know, because of being there. It is, "You scratch my back and I will scratch yours." I cannot prove it but these things happen and I accept that.

What I really think is that we are the hewers of wood and stone and skin. What people do not see in us—you see in the very artistic paintings that we Indian people have something that is hereditary. We have survived off the land before and we have a natural instinct to work with our hands. In our training at Lambton College, they said that never before, when training and upgrading people, had they seen people adapt so quickly with their hands and become skilled, in a shorter time than anyone else. We Indian people have something to offer, instead of portraying us as those bad guys, breaking the law and doing this and that.

I guess I had better close off. There is sort of a joke here, with these Indians all standing on the corner with a little feather. Up above, there are always little captions saying, "Ugh": u-g-h. I have shortened that to u-g. If someone says, "Where're you going, Charlie?," I will say, "I've got another one of those UG meetings." He will ask, "What do you mean?" I say, "It's Under-standing Government." Who the hell does?

Thank you.

**Mr. Chairman:** We will open it up to some questions. Mr. Eves?

**Mr. Eves:** I want to thank you for making this special effort to be here this afternoon. Sometimes we legislators in government tend to forget, especially in these hearings, that the Constitution is not just legal jargon; it is about Canadian people, and Canadian people's rights and freedoms. I cannot think of a better place to start than with Canada's original people.

I have expressed the strong viewpoint, which bothers me quite a bit, that 11 first ministers in this country think so little of native and aboriginal rights in their pursuit of self-government—which has been going on for many decades as I do not have to tell you—that they do not even put it on the agenda for the first round of constitutional talks, but think that issues like Senate reform and fishery rights in provinces should take precedence over a pursuit that has been going on by our native people for some decades.

The groups who have appeared before us so far expressing native and aboriginal concerns have indicated that, at the very least, what they would like to see as a first step is native and aboriginal rights and the pursuit of self-government added to the constitutional talks agenda for the next round.

Would you agree that may be a good first place to start?

**Chief Shawkence:** I think so. It was pretty disappointing when they said there was not going to be anything, again. As Joe Miskokomon said, dates do not mean much.

Speaking of fishing, we were here fishing in the inland lakes—I do not know where I put it, but I have archaeological evidence here—800 or 1,000 years before Christ and after. I can tell you exactly in this area, we have been here at the very minimum of 10,000 years, and in the Ohio valley, at least 20,000 years. We have evidence of that to prove it to you. I do not want to get into it, but here is one thing that really bothers me. The very land you are sitting on surrenders 29 sections; it went from 27 1/2 to 29. I had some figures here, the discrepancy in the number of acres.

#### 1600

When they first approached the chiefs, there were 400 Indians here. I forgot about this; I should have written it down, but when they came here they had interpreters. They started in 1818 to try to get the land from here. That is the next surrender or sale of land after the United States. Finally, in 1827 they got the chiefs together and they had interpreters. They made a deal. It took



until two years later; 27 1/2. The chiefs agreed in principle, "We'll do that."

Three years later or whatever, it was called 29. When they cut the final deal, there were no interpreters there. It is my words; it was exploitation of eight illiterate men. They trusted. They shortchanged the Indians over 5,000 acres of land which they were supposed to have set aside, and—I forget how many—damned near over half a million acres extra they took. If you want to read it, you get someone to read it. It is 27 1/2 and 29. You read it and you will see.

**Mr. Chairman:** Mr. Breagh?

**Mr. Breagh:** I do not have a question, but I do have something to say. I think you are a very wise man and very well educated and your people are well served by you. I think your problem is that you understand governments too well. You know how they work.

I think what we are trying to do is to overcome more than a century of shame and embarrassment for many of us, that agreements that were signed before this nation was a nation have not yet been fulfilled. I think there is enough determination in Canada now, and certainly enough skill among the aboriginal people, that we will come to a resolution of that. I have been in politics for only a little over a decade, which is not a long time, but I have learned that in politics nothing is impossible. You do have to be patient and you do have to wait, but circumstances change and they will change again. It is my hope that before we get all wound up with the Constitution of Canada, we will settle the treaty agreements we signed so long ago.

**Mr. Elliot:** I would like to thank you very much for coming and adding to three other very poignant presentations that were already made on your behalf by others.

In doing that, I have a question to ask because I am not in the happy position of some of the others; I have been in government for only six months or a little less. Unfortunately, it sometimes takes a little longer than that to get to know exactly how it works.

Having said that, I think those of us who have listened to your presentation are uniformly impressed by your sincerity, and what surprises a lot of us is the fact that you are willing to come back and talk to government representatives one more time, because you have been let down so many times in the past.

What I would like you to expand on a little for my own point of view is with respect to the fishing rights from your own band's point of view. I can understand that you resent the

beginning of the licensing back in the early 1970s, for example, and that you feel there should not be any licensing. What area of fishing are you talking about with respect to the rights associated with your rights to fish?

**Chief Shawkence:** As I said, I made a statement to Premier Davis in cabinet in 1980 on the statute of limitations. As you know, we have one of the largest land claims rights. I took my claim from Goderich to the International Boundary Commission on behalf of the Chippewa nation, because the land is not mentioned. I will just refer it back to Mr. McNab. He worked for the ministry and is now working for Ian Scott in the Attorney General's office. He got up in court and said: "The Indians never surrendered or gave up those rights. There is no mention of it. They only sold the sections of land. They only sold the to-the-water right."

If you look at history, the Americans sold it to the water's edge, and their very existence depended on it. We were commercial fishermen for years. Why would you give something up that your very life, your existence, depended on? If you look at the licensing, do you think it is right for one man to have a licence for the whole damned lake when they put us on the quota system? It is to one Indian. It is a quota system.

We try to talk these things over but there is something that Roberts and some of these past men of the past governments—what they say to you directly and what they put down on paper is a different story.

I might like to remind you fellows that I never interfere with the voting; it is their own free choice. But this time I did write a message to my members and said, "Support my man, whom I am voting for," and what has traditionally been Progressive Conservative went 100 per cent Liberal. I guess I am here to collect my dividends. I invested in you guys.

I see something great going to happen here. I do not know where it is going to happen; maybe with the native community branch. But I just want to say to you, if the federal government is going to make a deal with you guys, we want to be part of that deal before it shows up. Do not let them enact legislation that is going to supersede our rights in things like this. I do not know if I am answering your question.

**Mr. Elliot:** You are, in a way. What I would like to add is that in the other presentations we had a long time to question and get answers, and what came through to us very clearly, or at least to me, was that you are sovereign nation states

and you really want to talk to the federal government.

**Chief Shawkence:** Sir, I will tell you what we want. Those other chiefs are scared to. It is a statutory obligation by the federal government. Education and health are among the very things. We do not say that in our declaration. Then you will probably look at land treaties. It comes around to economic development. It is hard to define. They are scared to say this. I understand, but they are silent. They have been brought up this way. You say something; you are supposed to understand. I am speaking from the people. I am probably representing a whole bunch of people. Elders who have been on council would love to get up here and speak to you guys. I am speaking for a whole bunch of people who cannot really speak. They say: "You tell them, Charlie. You know how to do it."

Getting back to your question, we are not here to say we want all the land back. We want something, what we think is—we are going to be here; you probably are not going to get rid of us. They are not the type of people who go around raising a lot of hell, but I suppose if I said, "Let us go and raise hell someplace," they could probably cause a lot of problems. But this is 1987. We use your cars and we spend your money and all that good stuff. That is why I wore this jacket today. This is made on my reserve and I am proud of it. It is handmade. There is no other jacket like it. I would probably kill somebody if he took it from my back.

**Mr. Elliot:** The point I want to make is your people have a lot of communications that have to be taken with the federal government, but there are a lot of communications that have to take place with the provincial government too. There have already been enough of these described for us, very graphically, that we are listening. I am sure that over the next period of time, in those areas where the province can exercise some sort of control, there will be meaningful discussion with you.

**Chief Shawkence:** There are things I could not get into. I could describe the treaties because I have read them, from the American right up to Sault Ste. Marie, right from our reserve. They did not give up their rights to the lake. Then you go into Saugeen, to the north a bit. They were going to throw the chiefs in jail up there because they could not get the land. Eventually, they got their hunting preserve up there, 3,600 or 3,000 acres. They go on up north, all down through there, right up to Sault Ste. Marie, where they bribed them. I know they threw those old chiefs

back in jail. If you read history, you will find out about it. They would not sell their land because they knew the land was getting more valuable and they had to have things on paper. It is as simple as that.

The Robinson-Huron treaty, if you read it, says, "We want the same as them at Kettle Point, hunting and fishing." It does not say that here because the men trusted the signatories. They trusted them, and it is not written down. I have been told by my elders, "You go and find it." The more I research, I more I find through research. I could have got a whole bunch of things there I could have read to you what professors think of the premiers, but I do not want to embarrass you.

**Mr. Chairman:** Chief Shawkence, you made reference to the problems with fishing and with the Ministry of Natural Resources. Is a resolution coming to that? Is there something we should be taking back?

**Chief Shawkence:** The federal government simply refused to sign last year in our Indian commission office. We have meetings there. I simply refuse to go because I see it as nothing but a smokescreen; whatever you want to call it. Nothing is done there. There has to be some discussion—like I said to the judges, we have asked for moratoriums until we discuss these treaties and go over them. I guess really deep down inside, there is no government in Ontario or Canada that ever wants to admit that we never surrendered these. That is the bottom line. It is time to get out the books, like Dave McNab, the head researcher, and tell them that maybe some of us know. He got right up and said, "They never sold the land."

As I said, why should we have to prove it to you? It is up to you to prove how you took that land that you never owned, by enacting legislation, by amending legislation; pass the buck, back and forth. "Oh, that is a federal responsibility. Oh, that is a provincial responsibility." I have been up and down there too many times. It gets frustrating.

I got all worked up laying in the hospital bed and I said, "What am I going to do." Somebody said, "Gee, you got arthritis, Charlie, but your lips are flapping pretty good." I said, "Don't worry, I will think of something to say."

**Mr. Chairman:** We certainly hope you will not be in the hospital for very much longer and we appreciate the fact that you came from there to be with us this afternoon and to set out a number of thoughts on these different issues. As you have noted, and as others have noted, we have had three or four presentations from a number of your



colleagues. Certainly, for those of us who are new in the Legislature, there is no question that we have learned a great deal. I suspect that for those who have been around longer, it has reinforced a number of concerns they have had about how we have handled the whole question of aboriginal rights, the treaties, lands and so on.

We want to thank you very much for coming

today. Thank you for your thoughts and we will certainly take those with us as we deliberate on what we are finally going to say in our report.

**Chief Shawkence:** Thank you.

**Mr. Chairman:** That closes our meeting.

The committee adjourned at 4:13 p.m.

### ERRATA

No.	Page	Column	Line	Should read:
C-2	C-64	1	41	will unravel. I think this is a very real fear and
C-2	C-69	2	34	will read it; in a brief form it does state my main

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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Chairman:** Beer, Charles (York North L)

**Vice-Chairman:** Roberts, Marietta L. D. (Elgin L)

Allen, Richard (Hamilton West NDP)

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Harris, Michael D. (Nipissing PC)

Morin, Gilles E. (Carleton East L)

Offer, Steven (Mississauga North L)

**Substitution:**

Farnan, Michael (Cambridge NDP) for Mr. Allen

**Clerk:** Deller, Deborah

**Staff:**

Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:**

**Individual Presentation:**

Hudecki, Dr. Dennis, Professor, Philosophy Department, Brescia College,  
University of Western Ontario

**From the London Women Teachers' Association:**

Pieterston, Carla, President

**Individual Presentation:**

Robertson, William M.

**From the Refugee Host Program, A. R. Kaufman Family Young Men's Christian Association:**

Czesnik, Anna, Co-ordinator

Paterson, Richard, Volunteer

**Individual Presentations:**

Fullerton, Jack

Laur, Tina

McDonough, Connor

Korbin, Donn

**From the Chippewas of Kettle and Stony Point:**

Shawkence, Chief Charles K.













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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

**First Session, 34th Parliament**

Monday, March 7, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers



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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Monday March 7, 1988**

The committee met at 2:05 p.m. in committee room 1.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good afternoon, ladies and gentlemen. Before launching into the presentations this afternoon I think it is in order that we put on record the fact that since our last session our legislative researcher, David Bedford and his wife, Sue, have received into this world a charming, bouncing daughter, Riiko. I know you will join me in extending our congratulations to the Bedfords at this happy event. I think we all feel that we have shared in it over the last month or so of constitutional discussions.

**Mr. Breagh:** Who says this committee work is useless to citizens?

**Mr. Chairman:** That is right. It is a happy event. On that positive note, I would invite the representatives from the Women's Intercultural Network, who are here with us today, to come forward to the table. They are Rheba Adolph, Helen Flannagan and Firoz Shariff. I assume that one person is not here. Helen Flannagan is not with us. Fine. I understand you are both members of the executive committee of the intercultural network.

We have received a copy of your submission. Our procedure is simply to let you make your presentation, and then we follow up with questions. So perhaps without further ado I will turn the mike over to you.

### WOMEN'S INTERCULTURAL NETWORK

**Mrs. Adolph:** I am Rheba Adolph. This is my colleague, Firoz Shariff. What we would like to do today is to begin by telling you something about the Women's Intercultural Network, and to continue with some concerns we have around the Meech Lake accord. To conclude our presentation we will submit our recommendations. We will introduce ourselves as we come up.

**Mrs. Shariff:** Hello, I am Firoz Shariff. I am a member of the planning committee on the Women's Intercultural Network. I am a part of the Aga Khan Ismaili community here in Toronto.

This is the response of the Women's Intercultural Network to the 1987 constitutional accord, entitled A Matter of Fairness.

On June 3, 1987, the Prime Minister of Canada and the 10 provincial premiers met at Meech Lake and signed an accord which, if implemented in its present form, will affect deeply the rights of Canadians. The membership of WIN has serious concerns in this regard.

WIN, the Women's Intercultural Network, is an organization composed of women from different cultural backgrounds whose emphasis is on promoting communication and information exchange on issues, projects and programs of a nonpartisan nature relevant to women of diverse cultures in Ontario and in Canada. One of the major objectives of WIN is to sensitize governments and to facilitate their understanding of current issues of interest and concern to women of different cultures. It is within this context that WIN has examined the 1987 constitutional accord, or the Meech Lake accord, and offers its views.

In looking at the process in order to achieve this goal, our organization feels that it is important to request input from the Canadian public, and we applaud the Ontario government's commitment to conduct hearings on this most important constitutional development. We hope that such hearings will be conducted fairly and that the government will receive and consider those suggestions and recommendations that will be made.

We deplore that, to date, Canadians have not been given a real opportunity to discuss the issues presented by the accord in an open forum, and we trust that in Ontario a new standard will be set. On this note, I invite Rheba Adolph to take over.

**1410**

**Mrs. Adolph:** I would like to begin the presentation here by discussing or presenting the concerns that our organization has about the Meech Lake accord. Our concerns, in general, revolve around the following five issues.

The first is the protection of the equality of all Canadians. It would appear from section 1 of the accord, dealing with the recognition of French and English as fundamental characteristics of Canada and identifying only Quebec as a distinct society, that there is a potential for the denial of



rights of many Canadians. Since 1971, Canada has had an official policy of multiculturalism. Why is this not recognized in the accord? What is the implication of characterizing one society as distinct? Why are women, multicultural groups, natives, the disabled and other minorities not similarly identified?

Our second concern revolves around the delegation of the federal power of immigration to the provinces. Women's Intercultural Network is concerned about the transfer of immigration power from the federal government, firstly to Quebec and eventually to the provinces. In particular, we are worried that, given the wording of the accord, future immigration policy can be made in secret with no input from the Canadian public.

Moreover, provinces will be able to set their own criteria for immigrant admission and general integration other than citizenship services. We are therefore concerned that different criteria may prevail from province to province, with the result that some immigrant groups and refugees may be excluded from admission to any given province. This tool could effectively be used to weaken the multicultural component of any given province.

The third concern revolves around the national shared-cost programs in areas of exclusive provincial jurisdiction. Women's Intercultural Network feels that the emphasis on national objectives to be met by the provinces if they opt out, rather than upon national standards, has the potential for fragmentation of services for different criteria to be adopted from province to province. Moreover, it is unclear from the accord how the federal government will ensure that even the minimum of national objectives will be met. We are concerned that, following the accord, some provincial programs might be substandard.

Our fourth concern centres on the Senate and the Supreme Court. Our organization is of the view that an important constitutional document which purports to deal with the vision of Canada should take into account that any appointments to the Senate and/or Supreme Court of Canada reflect not only geographical interests; they should also reflect the very real demographic makeup of Canada, whose vast majority of people is made up of women, natives, members of multicultural groups, the able-bodied, disabled, old and young, among others.

Finally, we would like to address our concern around the amending formula. Full consensus in Canada in the past has not readily been obtainable. The amending formula in the accord goes

too far, as it will, through its unanimity provisions, effectively all but eliminate any significant constitutional reform in the areas set out in section 9 of the accord.

Our recommendations: Because of the concerns cited above, Women's Intercultural Network recommends that the accord be amended as follows:

1. To reflect that the Canadian reality recognizes the existence not only of French and English but also of other multicultural groups and of the native population.

2. To state clearly that nothing in the accord is to be interpreted as affecting those rights and freedoms set out in the Canadian Charter of Rights and Freedoms.

3. (a) To ensure that the federal government remain seized of immigration policy; (b) to ensure that any provincial or federal-provincial discussions on immigration and on setting criteria for immigration be discussed in an open forum.

4. To amend "national objectives" in section 7 of the accord to "national standards" to be monitored by the federal government.

5. To add that Senate and Supreme Court appointments should reflect the appointment of individuals from groups to whom equality rights have been extended under section 15 of the Canadian Charter of Rights and Freedoms.

6. To maintain the pre-Meech Lake accord amending formula.

Our final recommendation and conclusion: The recommendations set out above represent the minimum that the Women's Intercultural Network considers necessary to protect minority rights in Canada. Nevertheless, our organization is cognizant of the fact that our recommendations may not all be politically acceptable.

We therefore urge the government of Ontario at the very least to act to safeguard those rights and freedoms which were fought for over a lengthy period of time and which are now enshrined in the Canadian Charter of Rights and Freedoms. If the supremacy of the charter is not confirmed in the Meech Lake accord, Canadians will wonder what is the value of constitutionally protected rights which can be cast aside whenever 11 individuals choose to enter into a contractual agreement to that effect.

This, we know, cannot be the intent of the Meech Lake accord or the intent of the Premier of Ontario (Mr. Peterson). We trust that in Ontario we will take a leadership role and correct the misconception that has been created that the charter may be overridden by the Meech Lake

accord. This misconception, in our view, amounts to an egregious error which must be rectified to ensure a continuing faith in the constitutional process and in our governments.

**Mr. Chairman:** May I just ask you one point? I suspect that a page was skipped, page 3, headed "The Goal." I wondered if you wanted to read that for the record so that we have it as part of the Hansard. It seems to me you made some fundamental points there.

**Mrs. Shariff:** Sure.

WIN believes that the fundamental goal of Canadian society should be the equal recognition of all components of that society, whether those components are English, French, native or cultural minorities, men or women, disabled or able-bodied, of any particular age or religious persuasion.

It is for this reason that WIN applauds the fact that attempts have been made to have Quebec become a voluntary participant in the constitutional framework. The inclusion of Quebec and the acknowledgement of French language rights are of fundamental importance to the makeup of our country and should be recognized as such. WIN's position on the Meech Lake accord is definite on this point. Our organization, however, is concerned that the rights of other participants in the Canadian mosaic not be diminished in the quest to clarify the rights of any particular group.

**Mr. Chairman:** You have touched on a number of issues and, at this point in our proceedings, certainly those are ones that other groups and organizations have also touched on. I think a number of the points you make have been expressed by others as well.

To start the questioning, with respect to the immigration issue, what is here in the agreement in a sense goes beyond what has been happening of late. What is it that you see in what is there that is particularly worrisome for your organization? I wonder if you could just expand a bit on that.

**Mrs. Adolph:** Our concerns are in the area of citizenship programs which would be universal and global in Canada, so that an immigrant who comes into Quebec, say, would eventually be able to move within the country as a whole, having been versed in at least one of the major languages. I am not so sure and I think our group is not so sure that will happen—we are not saying it will happen—but what we are saying is that there is no protection for this not to happen.

Our second concern is that provinces could limit the kind of immigration that brings value

only to that province and perhaps not to other provinces.

**Mr. Chairman:** So the concern there would be that you would not, obviously, want to see anything which might limit the selection process on the basis of things covered by the charter, by human rights codes, that sort of thing.

**Mrs. Adolph:** Limit the selection process and also limit the usefulness of all immigrants to Canada.

**Mr. Chairman:** Thank you.

**Miss Roberts:** If I might turn your attention to page 8 of your presentation, paragraph 4, the fourth recommendation, you indicated that "national objectives" should be "national standards" to be monitored by the federal government." I wonder about the word "monitored." Could you just expand on that for a minute, please, if you would?

**Mrs. Adolph:** Our concern is that educational, medical and day care programs, all the programs that the provinces will enforce, may not be enforced on a Canadian basis with the same standards throughout all the provinces. We ask for national standards to which all provinces must accord with some sort of commissioner or some sort of committee that sets these standards and requires feedback from the provinces as to how these programs meet the standards and whether they are meeting the standards or not.

1420

**Miss Roberts:** If I might, Mr. Chairman, it is something that is not in existence today. Then you are suggesting an entirely different level of committee or commissioner to monitor what is going on in every province just to make sure that the provinces are meeting objectives. If you had "objectives," it would work just as well as "standards."

**Mrs. Adolph:** We are not certain that "objectives" would work as well.

**Miss Roberts:** OK. The other thing I would like to ask you about is that you made some comments in your presentation with respect to 11 individuals getting together to change the accord. Have you put your mind to how we can amend our Constitution and our charter from time to time? Have you ever thought about a different process, a more appropriate process?

**Mrs. Adolph:** There is always the example of the United States, where the state legislatures are able to ratify amendments. There could be a direct national referendum. That is another possibility.



**Miss Roberts:** I see. Thank you.

**Mr. Breagh:** On a couple of occasions in here you use the word "misconception." Many of us are struggling with what exactly this means in terms of an impact on the charter. I think that is probably the predominant question. Part of the difficulty is that, as Canadians, we are not familiar with constitutional processes. It is a relatively new one in Canada, so we are relatively unsure of whether one takes the accord and reads it in isolation or whether one is supposed to take the accord and try to fit it into the previous Constitution and see how it fits there.

You use the word "misconception." I think you are probably trying to reflect the fact that a number of people have said that nothing in this accord takes away any rights that you have had previously. By using the word "misconception," I take it you agree with that, but you are unsure.

**Mrs. Adolph:** We are unsure of the wording because it is not stated as such. For example, section 16 says that what has to be interpreted must be consistent with the charter and section 27. Section 27, from my understanding, is more of an interpretive formula. It brings guidelines and consistency with multicultural rights, but it does not state so in the accord.

**Mr. Breagh:** So basically what you want is one of two things: Either there would be something in this agreement which states clearly that the charter is not impacted by anything in this agreement or, as the only other option that I can think of, some court would make a ruling on that. The little hooker that is in here is simply that these days, no matter what we say, it is now going to be subjected in a much more direct way to scrutiny and to rulings by the courts. So one of those things has to happen before any of us really knows the answer to that question. I take it you would advocate either of those two solutions to it, would you?

**Mrs. Adolph:** Yes. I would certainly advocate a clear statement if there is an impasse or one has to weigh the balance between the charter and the accord. Also, our group was toying with suggesting as a recommendation that the government submit the accord to the Supreme Court for some sort of ruling.

**Mr. Breagh:** OK. One other little thing I have here is an old problem that all of us in politics face, and that is that whenever you get up to thank people in the crowd, you almost inevitably forget someone. It seems to me that that is part of what has happened with this

agreement. In attempting to address one problem—that is, to get the province of Quebec to be part of, in a legal sense, this constitutional package—the people who drafted this accord strove to kind of turn their attention to it, and they did so; but in doing so, they forgot to mention several other people.

Now, they say, "That was not our intention"; they did not mean to imply that any ethnic group, any handicapped group, aboriginal group or anybody else they had mentioned previously in the first round of constitutional discussion was in some way excluded by these agreements. But the question for most of us is: How come? It does appear that in certain parts of this accord they were mindful that it was necessary to include everybody or some would be left out, and so they chose some words carefully in some of the sections which made it clearer than it is in other sections.

I would be interested in your response to that. Before you start, to be fair, I cannot see us writing a Constitution which goes through the complete list of every group that we can think of in Canada and says, "Everybody is in." It seems to me much simpler and better to say, "Everybody has equal rights; therefore..." But I would be interested in a little bit of embellishment around your concerns of that nature.

**Mrs. Adolph:** Sure. Thank you. Two issues: Number one, our group certainly applauds the bringing of Quebec legitimately into the Constitution. Although they are legally in Canada, it seems that the province was not too thrilled with the previous constitutional arrangements; so we certainly applaud what has been done.

Our concern is with the exclusion; when there is an exclusion of one third the reality of Canada, which is the multicultural reality, and only two realities are stated, the French and English, we feel the courts may interpret this as the intent.

**Mr. Breagh:** Could you embellish that a little bit? I am struggling with this notion that some groups were excluded. I understand they were in the sense that they were not specifically named—maybe that is a legitimate concern and it may well turn out to be in front of the courts—but I would be more worried if I saw that somebody was actually, by words, excluded from this agreement. I do not see that. They are excluded by means of not being named. That is my hangup.

**Mrs. Adolph:** Would that not be an indication to judicial interpretation that the fact that two are mentioned means that these two have priority

over everybody else? In that sense, exclusion means secondary status.

**Mrs. Shariff:** If we go back to page 5, midway through the first paragraph—we are looking at section 1—once again I think what we are trying to do is we are trying to clarify that since 1971 Canada has had an official policy of multiculturalism. Why is this not recognized in the accord? What we are saying is that by mentioning French and English as the fundamental makeup of Canadian society, we are not officially recognizing the other third, as Rheba Adolph said, the cultural minorities. Multicultural should come to mean English, French and all the other cultural groups. Why should English and French be separated? That is number one.

Two, why is Quebec identified as having a distinct or special status while other cultural groups are not mentioned at all? Therefore, we have three standards in Canadian society: the English, the French and the rest, which is not mentioned at all. We want equal status for all three groups. I would not even say three groups really. Multicultural should come to mean one. English is a culture as much as Italian culture is. French is a culture as much as Portuguese culture is. Therefore, we at this stage should strive to achieve equal status, one society, and that is Canadian, rather than separating and giving a special status to Quebec and thereby giving a secondary status to the others.

**Mrs. Adolph:** I think what disturbs us is that if it is the intent of the accord framers to have equality for all the cultures, it is not stated. We would just like to see it stated. We believe you when you say it is. I cannot imagine anyone not believing that is your intent. But will people know that in 100 years, as they look through this in trying to interpret some of the conflicts that come up?

**Mr. Breagh:** I will leave you with this. The problem that I am having with this is that the way you see it is obviously different than the way the people who drafted it see it. The conundrum that we are in is, you would make it almost impossible to put forward an amendment to a constitution if every time you moved the amendment you had to say, "Well now, whenever I move an amendment to the Constitution of Canada, I have to make sure that everybody in this nation sees it in exactly that light, and I have to name them all specifically if I want them all in." So it becomes difficult to do that.

I appreciate your problem. The thing that bothers me is that you may be right, because when it goes to court, a judge may say, "Well,

maybe there is an inference of levels in here in that some were named in the first round, then some did not get named until the second round and some may not get named until the third round." Your point is legitimate. It is a question that we are trying to balance of whether this thing is looked at as a package integrated into the first set of constitutional negotiations and the first Constitution, or whether there is something different that might apply.

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**Mrs. Adolph:** Yes, and just as a follow-up, in 50 years when a justice is interpreting this and does not see everything written in—

**Mr. Breagh:** Exactly.

**Mrs. Adolph:** —or the recognition of Canada as a multicultural nation, not just a nation of English and French background, the justice would say, "If that was the intent of the framers, why didn't they say it?"

**Mr. Breagh:** Yes.

**Mr. Offer:** Just to carry on with that line of questioning, with respect to the concerns of the different levels you have indicated, you have briefly touched upon section 16. What, in your opinion, is the impact of section 16 where it specifically states that nothing in sections 25 and 27, basically the aboriginal rights and the multicultural heritage type of interpretative provisions, shall be affected by the section 2 type of discussion? I am wondering how you can say on page 5 that this has not been recognized in the accord when I think a lot of people would say that section 16 is an explicit recognition in dealing with the particular concerns you have brought forward.

**Mrs. Adolph:** You will have to bear with me because I am a lay person. My reading of the accord is not a legal one nor in any way a particularly educated one.

**Mr. Offer:** No, I just want to get your—

**Mrs. Adolph:** It is my understanding of section 16 that it does not abridge charter provisions 25 and 27. It is my understanding of charter provision 27 that it is mostly interpretative and the guiding principle that applies to the charter and not particularly to the whole Constitution. If it does apply to the whole Constitution, what I would like to see is a statement of that in the accord. I am not sure that brings the accord in line, in harmony with an interpretation of multiculturalism.

**Mr. Offer:** We have heard representations that specifically section 27 and section 2 are



interpretative provisions, as opposed to the type of rights-giving sections that appear very much in the Charter of Rights, and that how these particular things are going to be interpreted is up to the courts to make the final decision on; but the fact is that section 27, section 2 and section 25, of course, are brought into the same type of pot under section 16.

**Mrs. Adolph:** Would it not be clearer if the accord stated that these equality rights are substantive rights and not interpretative rights?

**Mr. Offer:** Would it not—

**Mrs. Adolph:** Would it not be clearer if the accord were to state that multiculturalism is a substantive right and not a guide to how rights are to be interpreted?

**Mr. Offer:** To answer your question with a question: if that is the concern, then would it not be that what you are looking for is a change to section 27 of the Charter of Rights; that the concern is not necessarily with the Meech Lake or Langevin agreement but merely with section 27 of the Charter of Rights, and that it should be changed from an interpretative provision to a rights-giving type of provision?

**Mrs. Adolph:** A substantive provision?

**Mr. Offer:** Yes.

**Mrs. Adolph:** I cannot answer that. It seems to make sense on the surface, but I guess we are talking about the accord here. Also, it is my understanding that although it has been stated that the accord and charter are equal, what happens when there is an imbalance or when one is tested against the other? Which has supremacy? We do not know. From my perspective, probably the best of all possible worlds is to state it in both documents.

**Mr. Harris:** I congratulate you on the presentation. It is short, brief and to the point, which appears to be difficult to do when we get into constitutional matters. I also share many of the concerns you have put forward. I want to ask you about two of them.

I have been away from this committee for two weeks while I have been making recommendations for the Treasurer (Mr. R. F. Nixon) to increase money for everybody. I want to get back to the point that my colleagues have discussed briefly and then I want to ask you about immigration.

I have not had my mind around this for the last couple of weeks, but the French-English is with reference to language not with reference to culture, and I believe there is some attempt in the Constitution—and as I say, I have not been

reading through the wording for the last two or three weeks—but it seems to me that there is some attempt to talk about the official languages of Canada being French and English.

Perhaps in doing that it implies culture as well, in which case I understand what you are saying and I accept your concern. Do you have a difficulty with French and English being the two official languages in Canada?

**Mrs. Adolph:** No, not at all. Whether it is in Quebec City, Calgary or Golden, British Columbia, we are a country of two national languages. I have no difficulty with that. I think our difficulty is in stating that we are a country of only two cultures.

**Mr. Harris:** I understand.

**Mrs. Shariff:** Also our difficulty is with not having identified in the accord women, multicultural groups, natives, the disabled and other minorities. They are not similarly identified as Quebec is; rather than the French language, Quebec.

**Mr. Harris:** Why is Quebec distinct then? Because of the French culture?

**Mrs. Shariff:** French culture.

**Mr. Harris:** Or is it because of the predominance of French-speaking Canadians?

**Mrs. Shariff:** Both perhaps, are you saying?

**Mr. Harris:** So you do not have a difficulty if it is because of the predominance of English-speaking Canadians. You have a difficulty if it is because of a predominance of French culture and singling that out.

**Mrs. Shariff:** I think the difficulty is with identification of all particular groups or any particular group as being above the others, regardless of—

**Mr. Harris:** But you would not have a difficulty that it is distinct because of the predominance of French-speaking Canadians.

**Mrs. Shariff:** No.

**Mrs. Adolph:** Actually, what we would like to incorporate are three realities: the English, the French and the multicultural.

**Mr. Harris:** But French and English, when you start talking cultural obviously they should not be mentioned at all. It should be multicultural regardless.

**Mrs. Shariff:** Multicultural society.

**Mr. Harris:** But there are many English-speaking people when you talk about English culture. There could be 50 or 100 or 300 cultures

that they bring. They just happen to speak English.

**Mrs. Adolph:** I do not think any of us have trouble with French and English as languages. Bilingualism is the official policy of the country, and we agree with that.

**Mr. Harris:** This distinct society and how it is going to be interpreted is undoubtedly causing problems in a number of areas. We have heard that—

**Mrs. Adolph:** What we would like to see is some statement of interpretation.

**Mr. Harris:** Your suggestion of the charter reference may be the best recommendation we have heard. We have heard so many interpretations in three or four areas of the Meech Lake accord. People say, "Well, if this is the understanding, it is OK;" but we hear so many groups saying, "Well, that is not our understanding." One lawyer says, "This is what I think will happen;" and another says, "This is what I think will happen."

Perhaps the charter reference is the way to go on those. If we are all comfortable that is what it means, fine; if we are not, it has to be changed. Surely that makes sense before it comes in as opposed to after.

I just want to ask you one other thing on citizenship.

**Mr. Allen:** Before you proceed, could I have a very small supplementary on the point you are just leaving?

**Mr. Harris:** I would be delighted if you could help clarify anything I am saying.

**Mr. Chairman:** Please go ahead.

**Mr. Allen:** It strikes me that we are using the word "culture" with respect to multicultural groups, with respect to the English-language phenomenon in Canada and with regard to the French-language phenomenon in Canada. If we use words at least with a little bit tighter definition—would it not be true to observe that section 2 does not use the word "culture" anywhere? It simply says that the fact that some people speak French in some places more than others and English in other parts more than others is a fact; and second, that Quebec constitutes a distinct society, not culture.

A society is a much more complex phenomenon than culture and can embrace many cultures. You really do not have a problem, I gather, with the wording that is there. You just want somebody to say that inside this Quebec society and inside this other—whatever it is, whatever the

rest of the country is—there is a multiplicity of cultures.

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**Mrs. Adolph:** Yes, that is exactly what it is. I can give you an intuitive definition of "culture," but certainly not an empirical or scientific one. "Distinct society" is probably more specific, but then what does it mean?

**Mr. Harris:** On immigration, you talk about the two aspects of it. It is the second one I want to talk about. "Moreover, provinces will be able to set their own criteria for immigrant admission"—then the second part—"and general integration." We have not heard a lot about this. One of the concerns that concerns me as well is, if the province is handling the integration is it doing so in the interest of the province or of the country? Is that what your concern is?

**Mrs. Adolph:** Yes. What we are frightened of is that the concern will be in the interests of the province as opposed to the whole country. From my own perspective, and I had a lot to say in the writing of this one, I am a social worker. I work in a very large community hospital and I see all kinds of languages, all kinds of cultures and societies walk through the doors, and I know that all the children of these people will have access to all the facilities in this province, but I am not so sure that all their parents have access. I think that limits ultimately the educational standard of the children. I would hate to see that differ from province to province.

**Mr. Harris:** I would too. I think many of us have concerns about a Parizeau interpretation of what that allows Quebec to do, to give us an immediate example, both in integration and in interpretation of the "distinct society" clause.

I thought it was a good presentation. Thank you very much.

**Mr. Chairman:** Perhaps I might, on behalf of all of us, thank you again for your presentation. As Mr. Harris has underlined, you have put together a good number of points in a very succinct way which, believe me, for a committee is joyous to behold. We thank you very much for the time and effort and for sharing your thoughts with us today.

Perhaps I might now call upon the representatives of the Nishnawbe-Aski Nation: the deputy grand chief, Lindbergh Louttit; the legal counsel, Shin Imai; I believe, as well, the chief of the Bearskin Lake Band, Rosie Mosquito; and the chairperson of the Wabun Tribal Councils, Bill Cachagee. Would you please come forward.



**Chief Louttit:** Good afternoon, Mr. Chairman.

**Mr. Chairman:** Good afternoon. Please proceed, and if I have not introduced someone whom I should have, would you please do that. If you would like to make your presentation, then we will follow up with questions.

#### NISHNAWBE-ASKI NATION

**Chief Louttit:** I want to welcome the opportunity to come here and speak with the people of the Ontario government and also to talk to you about this Meech Lake accord, but before we do so I would like to introduce myself. My name is Lindbergh Louttit, deputy grand chief, Nishnawbe-Aski Nation, also chief of the Abitibi reserve in Ontario. To my immediate right is the chairman for the Wabun Tribal Councils, Bill Cachagee, from Chapleau, Ontario. To his right is Rosie Mosquito from Bearskin Lake; she is the chief there. Since our legal adviser is away, we brought Shin Imai. Our legal adviser is Michael Sherry.

First, I would like to ask Mr. Cachagee to give you an introduction to the Nishnawbe-Aski Nation, what it is and where we come from.

**Mr. Cachagee:** Thank you, Chief Louttit. Mr. Chairman and delegates, thank you for letting us have a few moments of your time.

First of all, I guess this word "distinct" has opened up a lot of eyes and ears. I had trouble interpreting that word myself because the first word that entered my mind, as an Indian, was "extinct," but it was not mentioned there so I am thankful for that.

The Nishnawbe-Aski Nation is the political organization which represents the interests of the 45 Cree and Ojibway communities of Treaty 9 and Treaty 5 in northern Ontario. Those communities have a total population of about 25,000. The Nishnawbe-Aski Nation territory, as defined by the treaties, takes in nearly two thirds of the province of Ontario.

Participation in the constitutional process: the Nishnawbe-Aski Nation was an active participant in the political process leading up to the Constitution Act, 1982. The act includes section 35, which guarantees aboriginal and treaty rights. The Nishnawbe-Aski Nation supports the Assembly of First Nations' position that section 35 protects the unstated right to aboriginal self-government. After 1982, the Nishnawbe-Aski Nation participated in the four first ministers' conferences on aboriginal rights. While the FMC of 1983 resulted in some useful amendments to the Constitution, the FMC of 1987

ended in a deadlock on the matter of self-government.

The 1987 FMC and Meech Lake: the 1987 FMC on aboriginal rights was hampered by the Quebec Premier's regrettable decision to boycott the meeting. Also, negotiations were made difficult by the single focus on the matter of aboriginal self-government. This focus made tradeoffs difficult; tradeoffs that might have involved matters of concern to the federal and provincial governments, such as Senate reform, constitutional recognition of the Supreme Court of Canada and jurisdiction over immigration.

The Meech Lake meeting followed close on the heels of the FMC, but the two forums could not have been more different. At Meech Lake, proceedings were closed to the public and Quebec was a full participant. More important, the federal government was prepared to consider tradeoffs in relation to a host of issues in order to achieve the principal objective, the integration of Quebec into the Canadian Constitution.

Overall view of the accord: of course, the Nishnawbe-Aski Nation supports the general effect of the accord, which is to integrate Quebec into the Constitution. However, in view of the special relationship between first nations and the federal crown, the Nishnawbe-Aski Nation is concerned about the extent to which the accord weakens various federal powers. As a matter of first nations' solidarity, the Nishnawbe-Aski Nation is concerned about how the accord reinforces the "club" of provinces by freezing out the Northwest Territories and the Yukon in terms of the provincial status and the power to select senators and Supreme Court judges.

It is the position of the Nishnawbe-Aski Nation that aboriginal representatives should be invited to an FMC before the Meech Lake accord is finally ratified; in fact, the Nishnawbe-Aski Nation is in a process of seeking a legal opinion which argues that such an FMC is required by section 35.1 of the Constitution Act of 1982.

At this time, I would like to turn this over to Chief Louttit.

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**Chief Louttit:** In the matter of introducing new provinces to Canada, we disagree with the process by which this is done. We believe that it should be done with the federal government and not with the idea of having seven provinces agree to what destiny these provinces want to go to. We totally disagree with this process. We believe it should be done between the people of Canada and those people who want to have a new province.

For example I use the Inuit people who live in the Arctic. Why should they be torn apart by 10 other provinces? Why should they not just deal with the federal government? Why should Prince Edward Island, which is nowhere near the Arctic, have a say in whether the Inuit people should have a province or not, when they very well could have one? They are not attached in any way, shape or form, nor is Nova Scotia, New Brunswick or those other provinces. Quebec and Ontario and those other provinces might have some say, but we disagree with that process. It is not justified, even though we are all Canadians.

The other topic that I want to talk about is the weakening of the federal power. This process weakens the federal power in programs that are delivered to native people; programs such as health, education, policing, justice, those types of things. Those programs are being taken from the federal government and given to the province to be distributed to the native community, and the province takes a chunk of money away to administer that.

Right now it is coming from the feds directly to the native people. The province has no mechanism in place to directly give moneys to the programs on native reserves. There is no mechanism in place, and they cannot legally do it. They are trying to give us high schools in the north right now, but here is our reserve that is 30 square miles; the community is on one corner here. They want to put the school over on this corner, outside of the reserve boundary. They have no legal mechanism within their government to spend money in the reserve itself, since that is under federal jurisdiction.

**Mr. Cachagee:** In regard to some of the programs that I guess the federal government hands down to the provinces to administer, I have difficulty sometimes with trying to update a program to the needs of the Indian people, let alone downsize it to reduce the deficit at the expense of the Indians. We are not the sole contributors to this deficit.

Whenever we go to the province and ask for the needs, there are either cutbacks or the famous saying: "That is not our responsibility; it is a federal responsibility." When the federal government turns over the authority to the provinces to administer various programs, if it does not have 100 per cent authority to administer the provinces use this fallback position, "It is not our responsibility." Yet they are not shy to receive 100 per cent of the funds for the administration of these programs.

The ultimate goal of the first nations is how I interpret Indian self-government. In time, we would like to deal directly with the federal government on a one-to-one basis, whether it be through Treasury Board, as long as we get this program delivery to meet our needs. The federal government is responsible for that, and we would like to have that in place at the band level. This is the only problem that I find. The provinces say, "That is not our responsibility." I hear this time and time again and I am getting fed up with it. Something has to be done about it.

**Chief Louttit:** The other thing I would like to talk about here is the constitutional conferences. We want to be involved as first nations. We do not want to be left out of any decisions made about this country. After all, we are the first nations of this country and we have been left out of Meech Lake. They do not want us. It is not a good decision made by the people, leaving the first nations out. It is our land and resources that built your country. It is with trade; for education, health. Let us talk about education. To give you an example how we have been left out, of the Nishnawbe-Aski Nation of 25,000 people, how many thousand do you think are children? There are just under 2,000 kids under 16 years old who do not go to school. They do not go to school.

We are supposed to trade our resources for health and education. You take our resources from this country, resources that you live on and thrive on. Our resources built this beautiful city, the resources from our nation. Yet you continue to leave us out of any major decisions that are to be made about this country and how it should be run. We want a piece of that. We want some say in these different things. It concerns our children and our health and our wellbeing. These things are very important to us, and we want to be there when you make those decisions.

We have people at the Assembly of First Nations who look after this, our leaders. We recognize them, as a nation. I forgot to mention at the beginning, I do not know if those papers came in yet from our office, there are a few other things in there that I probably forgot to mention. As long as they are written, you have them. There may be a few other things that our people want to add before I make other comments on the constitutional conferences.

**Chief Mosquito:** Mr. Chairman and committee members, I too would like to thank you for the opportunity you have given the Nishnawbe-Aski Nation to present some of our concerns with regard to the Meech Lake accord. The comment that I would like to make at this time is with



respect to the constitutional conference, which Lindy Louttit has just discussed. I want to expand upon it.

With respect to the constitutional conferences there are actually two areas of concern that I would like to bring to your attention at this time. There is a third point which our lawyer, Shin Imai, will explain to you. The first concern that we have with regard to the constitutional conference is that we feel the Meech Lake accord should provide for a future first ministers' conference which will deal with the aboriginal constitutional matters which have been unfinished. That is the first point and that is a very crucial point to the Nishnawbe-Aski Nation. That is the first point I want to put across.

### 1500

The second point is that the Meech Lake accord provides for two first ministers' conferences per year for an indefinite length of time. We feel, as the Nishnawbe-Aski Nation, that when those first ministers' conferences are being held, if the issues being discussed at those conferences directly impact on the aboriginal people of Ontario and of Canada, they should be included in those first minister's conferences. It may not be all of them, it may only be some of them, but what we are saying is we feel we should have a direct involvement in those conferences on matters that directly affect our lives.

The third point we wanted to bring to your attention I would like to make a few more comments about later.

**Mr. Imai:** As Chief Louttit said, I am sitting in for Michael Sherry, who is a lawyer for the Nishnawbe-Aski Nation. He sends his regrets. Unfortunately, he is in Moosonee, somewhere near James Bay; I hope not lost. The point is whether it is proper to proceed with the ratification of this accord without calling for a first ministers' conference to which aboriginal people are invited. The argument, as I understand it, goes like this: if you look at section 35.1 of the Constitution, which is an amendment that was made in 1984, it provides that when section 25, section 35 or section 91.24 of the Constitution are about to be amended, then there has to be a conference. I will quickly read the section for you:

"The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the Constitution Act, 1867, to section 25 of this act or to this part,

"(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

"(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item."

It clearly provides, when there is going to be an amendment to any of those sections, that there should be a conference called in which aboriginal peoples are invited to participate. The question then is in section 16 of the proposed amendments which mentions sections 25, 35 and 91.24. The issue is whether that section, which basically says the proposed new section 2 does not affect those sections, brings it within the purview of 35.1.

On the face of it, a section which says that the sections covered in it are not affected by another section would not appear to come within the purview of another section that says you have to call a conference when you are amending the first section. I think, if you go through the Constitution, every word becomes extremely—I am sure you have heard days and day of this—every word becomes a battleground in a way. There is nothing that is certain. Certainly a section which says that section 2 does not affect 25, 35 or 91.24, itself, I think, can be a point of dispute.

To illustrate this, I have just gone through the various Constitution Acts and for a point of illustration I would like to show you the variety of ways in which people have described, have put in a section which says another section is not affected, or that the powers relating to another section are not affected by another section. It is all very complicated, but let me go through the wording.

There is something in section 1 of the accord, which is section 2, that says, if you look at subsection 2(4), "Nothing in this section derogates from the powers, rights or privileges of Parliament," and so on. You have "nothing derogates."

Look at section 7 of the Langevin accord. It says, "Nothing in this section extends the legislative powers of the Parliament." You are saying this section does not extend it. If you go back to the Constitution Act, 1982, subsection 16(3) says, "Nothing in this charter limits the authority of Parliament or a Legislature." So far you have that it does not derogate, it does not extend and it does not limit.

Section 21 says, "Nothing in sections 16 to 20 abrogates or derogates from any right." Section 22 says, "Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege." Section 25 says that the aboriginal rights mentioned in that section are protected from the Charter of Rights. It says that the Charter of Rights "shall not be construed so as to abrogate or derogate." This is a new one. It is "not be construed so as to abrogate or derogate."

The next section, section 26, says, "The guarantee...of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms." Now we are into "denying the existence." Section 27, which you have probably heard a lot about, the multicultural heritage section, says, "The charter shall be interpreted" to preserve. Section 29 on separate schools says that the charter does not abrogate or derogate from rights.

Section 37.1 says, "Nothing in this section shall be construed so as to derogate." Now it does not say "abrogate"; it just says "derogate." It says "construed." It does not say "abrogate or derogate." Section 92A of the amended Constitution Act, 1867, on natural resources says that nothing in this section "derogates from any powers or rights."

You have a tremendous range of ways to word the various sections that say, "What we are doing here does not change these rights here." Of all these ones I have mentioned, not a single one says, "This section does not affect this section," which is section 16. We have had "abrogate," "derogate," "limit," "does not extend." We have had "should not be construed to derogate." We have "should not be construed to abrogate or derogate." We have "should be interpreted." Not a single one says "affect."

The point I am making is not that there is any finality or that we all know what those different ways of wording it are, but that it indicates there is doubt as to the effect of what appears to be a very straightforward section saying, "This section does not affect this section." It is a battleground, as with everything else.

**Mr. Chairman:** Perhaps that is why the lawyers keep smiling as we continue on through constitutional reform.

**Mr. Imai:** If you could command your lawyers to clean up the Constitution so it has uniform terms maybe it would be more straightforward, but it is a battleground. The whole point of having section 35.1 in the Constitution, the amendment that was made in 1984, was to ensure that when there were changes, potentially to the

aboriginal rights section, at the very least the groups concerned would be invited and would be able to participate. Even though the section does not provide that they have a vote, they would at least participate in the very important word-crafting that has to go on.

What has happened is that in section 16 you have now a certain set of words which I concede on the face of it does not come within the purview of section 35.1, but I think the argument is that even those words should be looked at and that there should be a conference to fulfil the constitutional requirements in order to ensure proper negotiations are conducted to put the most effective words into the Constitution.

**Chief Mosquito:** You can see why we asked Shin Imai to talk about this, because I myself am not familiar with the legal, technical terms. I guess the point, simply speaking, that we wanted to raise was that with respect to the Meech Lake accord, Mr. Imai, I believe in his legal, technical terms, has explained that yes, there was a provision within the Constitution for aboriginal people, and that provision will not be affected by the Charter of Rights and other parts in the Constitution. What the Nishnawbe-Aski Nation is also saying is that before the Meech Lake accord is ratified, a first ministers' conference should be convened or some kind of forum should be provided where we can also ratify the Meech Lake accord and that will address the concerns we have.

## 1510

Committee members might be sitting here and wondering: "Well, why do they want that? That provision has been made within the Constitution." I think what we want to illustrate to committee members at this time is that yes, perhaps you might think that Nishnawbe-Aski Nation does not trust the governments in power to date, and that is exactly what we want to bring to your attention at this point. Nothing in our history has shown us or convinced us to trust the governments in power today, including the federal government and the provincial government. Basically, that is the reason we would like to see future first ministers' conferences involving the aboriginal people at that table, particularly in matters and only in matters that affect aboriginal people. That is basically all I had to say. Thank you.

**Chief Louttit:** I think I might add that those matters she talks about—the land and the resources, the air, the water; all those things affect us.

The other thing I want to mention to you is that the Nishnawbe-Aski Nation respectfully submits



the following recommendations for the consideration of the Legislative Assembly select committee, and you have those on page 11, I believe:

1. The Ontario government should reinstate constitutional funding to the first nation organizations, such as the Nishnawbe-Aski Nation.

2. The Ontario government should adopt and advocate the view that a first ministers' conference with aboriginal rights on the agenda must be held before the ratification of Meech Lake.

3. The Ontario government should work with the first nations to make self-government the number one item on the constitutional agenda in the first ministers' conferences that follow the ratification of the Meech Lake accord.

4. The select committee should take on aboriginal self-government as a top priority after it reports on Meech Lake.

I again want to thank you for having us here. We hope that you take some of our recommendations and take a good, serious look at them, because they are serious to us. It is our land and resources that we created for your good looks.

**Mr. Chairman:** Thank you very much for the brief and your comments. As you know, to this point we have had several submissions from a variety of native organizations, and certainly a number of the points which you have made today underline points that were made earlier. It was an innovative legal point that I do not believe we have heard before, which is intriguing, in terms of subsection 35(1) and section 16; that certainly is pause for reflection as well.

If we could turn, then, to questions, I start with Mr. Breaugh. I have Miss Roberts and Mr. Harris.

**Mr. Breaugh:** A couple of quick points. We have discussed with other groups what might be done in terms of trying to establish a first ministers' conference on aboriginal rights in the foreseeable future. There seems to be not quite unanimity about how important that is or the timing of the matter. I am rather attracted to the notion you are putting forward here today—"Take your time, but do it before you ratify Meech Lake"—and I want to focus on that just a little bit.

One of the major problems that I and several other people have with this is that should this accord get ratified in its present form, it then makes very difficult attempts to come to an agreement about aboriginal rights, for example. One could read this accord and say that if one player decides he does not want this agreement to proceed, he in effect blockades it; and if that is not exactly correct in this accord—because there are some limitations and qualifications about

where the vetos apply—then in the political sense it is correct that there will be some horse trading, and I have no doubts that there will be. There is lots of evidence in this accord that a fair amount of horse trading went on at Meech Lake, where different premiers said, "If you put this in the agreement, I will agree to something else," or "If you take one part out, it meets our needs."

I would like you to address just for a minute some of your concerns about how important it is to resolve, either totally or in part, the question of aboriginal rights before the ratification process of Meech Lake takes place.

**Chief Louttit:** The number one thing is Quebec. We recognize that, in the way we recognize all people who have come to this country.

The Meech Lake accord does not reflect enough on aboriginal people, the first nations of this country. I do not have enough time to explain everything to you, what we would like to see and what we could discuss in this forum, but certainly I could request more time and come back with a paper that would make more recommendations. We made a few small recommendations here.

**Mr. Breaugh:** Maybe I can help you out a little bit.

**Chief Louttit:** Yes.

**Mr. Breaugh:** Some groups have essentially said: "We were frozen out of this process. If it goes through, we will be frozen out of any further process. But it does not matter, because we are going to be off to the courts anyway, and time is not as important as some other aboriginal groups thought." For example, the Senate committee said that by 1992 we should have a first ministers' conference to resolve aboriginal rights. Some thought that was important; some felt it was irrelevant, frankly, because that is not going to be the vehicle whereby aboriginal rights are settled. It will be the courts that do that.

I would be interested in hearing, because in your recommendations you did make a very specific point of saying, "Settle the aboriginal rights questions first, before you ratify this accord," which I find a very attractive notion. It might give somebody a little incentive actually to do something. But there is not total agreement, I am telling you, from the aboriginal groups that have appeared before the committee as to how important that is.

**Chief Louttit:** It is extremely important to us. Again, we are two thirds of this province, our nation. Two thirds of the resources that lie in this nation, in this province, are our nation. There-

fore, looking at those square miles of resources that are out there that are going to be taken and not be given back to us—that is how it is going to end if we continue this process.

Let us settle that first before we go back and talk to these people in the federal government. Let us settle it. Let us see where we all stand. We want to be fair. We have been more than fair. There are a lot of questions here. Go ahead.

1520

**Chief Mosquito:** I guess as I understand it, the question you might be asking us is, how important is it to settle aboriginal rights before the ratification of the Meech Lake accord?

I agree with Lindy Louttit. It is very important; it is very important to us. We are aware of the time frame. All of us have time frames to meet, but I think one of the things we are also saying is that if there is a provision or recognition that there will be a future first ministers' conference to deal with aboriginal self-government, that in itself would be a step forward and that is what we would like included in the Meech Lake accord. We would like that provision made in the Meech Lake accord.

**Mr. Breagh:** OK; one final quick one. One of the recommendations is that the Ontario government should reinstate the constitutional funding of the first nations organizations. I would like you to elaborate a little bit on that. It seems to me David Peterson could get himself a lot of brownie points here by simply reinstating funding. Can you tell us what the government of Ontario—never mind the feds and all the other evil players—how about the white knights in Ontario? Are they providing any funding for any of the constitutional work that you are doing?

**Chief Louttit:** Rosie?

Interjection.

**Mr. Breagh:** If they are, it is not catching a lot of attention.

**Chief Louttit:** I guess they are not. I have not seen any myself.

**Mr. Chairman:** Very quiet grant system.

**Mr. Breagh:** There is no such thing as a quiet grant in this government, and we know that.

**Chief Louttit:** The only thing that we have received to deal with this is the memorandum of understanding and the letter of intent. There is another one, but it has nothing to do with this. It has nothing to do with the process.

**Mr. Breagh:** Do not try to cash them, either.

**Chief Louttit:** No.

**Mr. Breagh:** You would be surprised, I am sure. The Treasurer of Ontario (Mr. R. F. Nixon) will find you in the next week with a big cheque and solve the first problem.

**Chief Louttit:** We can appreciate the fact that your Premier recognized us—

**Mr. Breagh:** He is not my Premier. I made that mistake once; I do not make it twice. Thank you.

**Chief Louttit:** You are sitting in his province.

**Miss Roberts:** If I might just carry on from Mr. Breagh's comment with respect to the funding of this process, I believe this legislative committee is one of the first to look at this Meech Lake accord in this particular round of negotiations. What you are saying is that you did not receive any grants from the Ontario government to come down here for this or that you did not receive any grants from the Ontario government to research what is going on. I assume that is what you are saying.

Then I would like to go into your interesting legal argument, because I would like to determine just exactly how far you have gone on that and what you expect to do. Maybe your legal counsel can answer me with respect to that.

**Mr. Imai:** I am not sure what you mean by how far we have gone. I assume that I have convinced you absolutely in my little dissertation.

**Miss Roberts:** You have convinced me that there is an argument that someone might be prepared to make to someone. Is someone going to make that argument? Do you intend to take a reference or to make the argument in front of the courts somewhere?

**Mr. Imai:** As far as I know, that has not been determined. It is a point that deserves consideration and certainly something I would hope this committee would take under advisement in looking at that question quite closely.

**Miss Roberts:** What I am asking is, have you gone far enough with respect to your legal argument that you are prepared as a group to take it to court, and your answer is no. You think someone else should take it on your behalf. Is that correct?

**Mr. Imai:** As far as I understand it, there has been no decision made on what specific actions to take with respect to the argument. The implication in your question was that there had been a specific decision not to proceed further with that. There has not been that negative



decision. I certainly think there will be a great deal of interest in knowing how this committee handles that question.

**Miss Roberts:** It might take us some time before we report. All I am trying to do is to encourage you not to sort of sit and wait. You have processes of your own that you can take and that may be possible.

**Mr. Imai:** Perhaps if there is going to be constitutional funding, we may be able to.

**Miss Roberts:** It sort of went along from there, so you have to take that into—

**Mr. Breaugh:** The cheque is in the mail.

**Mr. Chairman:** A supplementary, just on that point, from Mr. Offer.

**Mr. Offer:** Yes. On the constitutional funding, you have said that you want it to be reinstated, which means that there was something there before. Was there something there before? If there was something there before, who was paying that?

**Chief Mosquito:** There seems to be some confusion on that. The constitutional funding that we have received to date has come from the federal government; it has not come from the province.

**Mr. Offer:** Is the constitutional funding from the federal government still in place?

**Chief Mosquito:** Not as far as I know.

**Mr. Offer:** The federal government has taken away the federal government funding?

**Mr. Imai:** No. The federal government funding ended after the first ministers' conference. If you reviewed the Senate report, this is one of the recommendations it made. Prior to the specific first ministers' conferences, I do not know the details of this, but my understanding is that the province did kick in some sum to help with some of the organizations. Now that has gone as well.

**Mr. Offer:** I understand there was some federal government funding with respect to the constitutional talks and that program was ended by the federal government.

**Mr. Imai:** That is right.

**Mr. Offer:** Just as a follow-up—

**Mr. Chairman:** This is a second supplementary?

**Mr. Offer:** Yes.

**Mr. Chairman:** Right.

**Mr. Offer:** It is on the same line, though, Mr. Chairman, you will see that. With respect to the province of Ontario, does Ontario not have an

organization which native groups are a part of in dealing with different issues? Is there any form of organization?

**Chief Louttit:** The only fellow we have is Fontaine and he has had problems with money.

**Mr. Imai:** I am not sure whether I can assist, but there are various bodies. Some of them, including the federal government, first nations and the provincial governments, deal with different problems. I do not know whether you are referring to any one of them. There are a couple of agreements to try to deal with larger issues. One of them that the Nishnawbe-Aski Nation is involved in is called the memorandum of understanding. They are trying to deal in a forum that involves the federal government; the provincial government and the Nishnawbe-Aski Nation to deal with land issues in two thirds of the province.

**Mr. Lupusella:** There are programs falling under different ministries, as far as I understand it.

**Mr. Imai:** That is right. I think the Nishnawbe-Aski Nation is involved with a couple of other groups in something called the declaration of political intent to deal with education on a broad scale. At certain points in the history of provincial-first nations relationships, there have been things like a cabinet-first nations joint committee, as I understand it; that kind of thing. There is nothing at that level right now. Does that clarify it?

**Mr. Offer:** Thank you.

**Miss Roberts:** Just briefly, one more comment: the indication was made or some comment was made that each word and each clause is very important; that may become a battleground from time to time. Looking at the Constitution and looking at the charter itself, I think each word and each clause is still a battleground and will always be a battleground as we fine-tune it for the society in which we live from time to time. We must guard against making it too specific so that we exclude people. I think that is very important.

What I want to be sure about is your position with respect to the first ministers' conference. You indicated, I believe, that you would like to be at the table when it had something to do with your particular nation. I cannot foresee very much that would not have a lot to do with your nation. I think that would mean you would be at the table, I assume for most of the time, but not as a voting member. Is that correct?

**Chief Louttit:** Naturally we want to vote. That is our land.

1530

**Miss Roberts:** That is not part of it right now. Is that what you are—

**Chief Louttit:** Not right now, but before it comes to that, we want to be there. We want to be recognized.

**Miss Roberts:** On what basis, though? That is the question.

**Chief Louttit:** As far as the Nishnawbe-Aski Nation is concerned our livelihood, for example our children for example our health; we want to be recognized at those—

**Miss Roberts:** No. I understand the reasoning behind it. I understand the basis behind it. I will be very brief. When you are at the table, you want to be there with spokespersons with a voting right as well.

**Chief Louttit:** Absolutely.

**Miss Roberts:** All right; thank you.

**Mr. Allen:** I am very pleased the Nishnawbe-Aski Nation has come to make its representation before us and make its points forcefully and leave us with a document we can review later.

I note that on page 2 you state very briefly, "The 1987 FMC on aboriginal rights was hampered by the Quebec Premier's regrettable decision to boycott the meeting," and then you leave it at that. Why were you concerned that the Premier of Quebec was not there?

**Chief Louttit:** He was not there. I do not know why they did not recognize us. They did not see any matter for being there at that time.

**Mr. Allen:** Perhaps you misunderstood my question. What I am asking is, why did you consider that those meetings were hampered by the absence of Quebec from the last meeting on aboriginal rights?

**Chief Louttit:** Now that they are recognized in this country, they could have been at that conference and could have voted for us as the seventh province and we would have had our self-government.

**Mr. Allen:** Why would that happen with Quebec present?

**Chief Louttit:** Prior to that, the Quebec government was not recognized, I suppose.

**Mr. Allen:** Do I understand from what you have stated here that you believe Quebec would be on your side in those discussions?

**Chief Louttit:** After this Meech Lake accord has gone through and they are recognized, then they should recognize us also. Because they were

not recognized, they did not recognize us or anybody, so they did not show up.

**Mr. Allen:** I understand that. I think various people have observed that the Quebec government is probably more favourably disposed to aboriginal self-government than some other governments in the country. The next question I want to ask you is, why would you want to go back into a discussion of aboriginal rights before Quebec gets back at the table? Anybody at the table can answer that. I am not addressing it to any single person.

It would seem to me that since it is very unlikely some of the western governments that proved much of the stumbling block in the earlier discussions of aboriginal rights can be shown to have changed their minds, you need some change in the balance of forces when you go back to discuss aboriginal rights again. Rather than asking for another first ministers' meeting before Meech Lake is concluded, would it not be better to make that request after Meech Lake is approved so that then you have Quebec on your side?

**Chief Louttit:** I would be very uncomfortable, because after that—

**Chief Mosquito:** Do you want to finish your point?

**Chief Louttit:** Go ahead.

**Chief Mosquito:** There are a couple of questions you are asking as to why we might have included that statement on Quebec hampering the 1987 FMC.

**Mr. Allen:** Not Quebec hampering, but the discussion being hampered by the absence of Quebec.

**Chief Mosquito:** It is a matter of semantics. I suppose in one way what we are saying is that perhaps they could have been instrumental—we are not saying they would not have been on our side, but they could have been instrumental—in facilitating the discussions at the first ministers' conference of 1987. After all, it is a large province. I do not know the exact population. With the amending formula as it existed then—seven provinces and 50 per cent of the population—there might have been that possibility of settling or finishing the first ministers' conference on aboriginal constitutional matters back in March 1987.

I guess the other question that you had then was if, in fact, Quebec was or was not on our side, would it be better to—

**Mr. Allen:** Quebec was, in fact, more likely to be on your side. Would it not be better to wait for



the first ministers' conference that you are proposing on aboriginal rights to follow the ratification of Meech Lake rather than before?

**Chief Mosquito:** If the Meech Lake accord is ratified, it would only make it more difficult.

**Mr. Allen:** Why?

**Chief Mosquito:** Because of the amending formula that has been introduced in the Meech Lake accord. It says it requires the consent of the 10 provinces.

**Mr. Allen:** The amending formula has a list of items under the unanimity principle that relate to various federal institutions. None of them is aboriginal rights, so that you really come under the same old formula still, as I would read it. It would not be more difficult.

**Chief Mosquito:** Then, again, from we have been hearing, every term that is used in the Constitution can be a battleground.

**Mr. Allen:** Yes, but some more of a battleground than others.

**Chief Mosquito:** You came up with that argument and who is to say that somebody else will not come up with a contrary argument to that?

**Mr. Allen:** I think that is worth thinking about, though, asking that tactical question, because you want more battalions on your side the next time you go into those discussions. That would be my sense of it.

**Chief Mosquito:** The point that we want to make is that there should be a provision made within the Meech Lake accord that a first ministers' conference dealing with aboriginal constitutional matters be made. I think Shin Imai would like to expand upon that.

**Mr. Imai:** Chief Mosquito just made the point that I was going to make, that if you open it up and hold up Meech Lake, it does not necessarily mean that you are going to resolve the whole issue of self-government. Right now, the accord is silent with respect to anything dealing with a first ministers' conference on aboriginal matters. Perhaps opening it up would allow that. One of the demands is to allow that to be included. Right now we have silence. So I do not think that necessarily implies that you are going to resolve what has been a very complex matter for the past several years.

In terms of the unanimity, you are correct. For the amendments that the first nations and the aboriginal peoples are seeking, it may not require unanimity, although an argument was raised by Saskatchewan during this last first ministers'

conference, which you may or may not know about, arguing that in fact unanimity was required to make the amendments that were being sought. It is a very complex constitutional argument which I would be happy to take you through some time.

I get a feeling—I see a lot of rolled eyes, but that was an argument that was made. As well, your colleague Mr. Breaugh also suggested that one of the conventions that may be set up, even though it is not in law in the sense of a convention, was that you would be encouraging unanimity for all amendments, in a sense, by allowing one province to hold it up. So I think that in terms of opening it up, it does not have to resolve into a situation where we are trying to solve, to close off the aboriginal questions in a final manner.

1540

**Chief Louttit:** There is one final thing I want to answer to you. The reason we would have liked to have had that before is that if we do not have it before, if you go ahead with the Meech Lake accord, it is going to weaken the federal position. That is who our treaty is with, the federal people. What chance do we have if we weaken that? We will have further arguments, more battles. All kinds of crazy things could come out of it. There are things going around back home that are not too pleasant right now. I think we should deal with them at first hand. I do not want to get into another South Africa.

**Mr. Chairman:** On behalf of the committee, I thank you very much for coming today, presenting your brief and answering various questions. You have underlined a number of issues and brought new light to some that have already been raised. We thank you very much for taking the time to be with us this afternoon.

**Chief Louttit:** Thank you very much for having us.

**Mr. Chairman:** Our pleasure.

**Chief Mosquito:** Can I make one personal comment?

**Mr. Chairman:** Yes.

**Chief Mosquito:** Page 12 of the brief you received says the Meech Lake accord "was reached through an undemocratic and high-powered form of executive federalism." We understand that the Prime Minister, with the premiers, came to this agreement with the idea of wanting to reinstitute co-operative federalism. I would like to bring that out and bring it to the attention of the committee members because, basically, that is the position we would like to

have, a co-operative working relationship with the federal and provincial governments in a manner I would like to define as co-operative federalism.

**Mr. Allen:** Can I ask Mr. Imai to provide us with any written documents he has pertaining to that Saskatchewan government interpretation of the unanimity principle applying to aboriginal rights?

**Mr. Chairman:** Would that be possible, Mr. Imai, if we could be in touch with you?

**Mr. Imai:** You can certainly feel free to be in touch with me. I would have to talk to you about the classification of the—

**Mr. Chairman:** Do we have the address where we can reach you and discuss it?

**Mr. Imai:** I can give my card to the clerk.

**Mr. Chairman:** All right. Thank you again. Mr. Harris?

**Mr. Harris:** Just while we are on the subject, I would be interested in anything the Attorney General's department has on the legality of making changes without a first ministers' conference with the first nations present. I think that was the first point they brought up. Sorry, I do not have it here.

**Mr. Chairman:** Section 35.1.

**Mr. Harris:** I wondered about that one as well.

**Mr. Chairman:** OK. I will ask the Honourable Donald Johnston, member of Parliament, to come forward as our next witness. On behalf of everyone, I bid you welcome to the committee, Mr. Johnston. It is a pleasure to have you from that place to this place, if that is the way we should put it.

I apologize that we are running behind, but I can assure you that it will not interfere with the time of our discussion with you. Inevitably, it seems in these discussions that we run late, never early. We have distributed a copy of your brief to everyone. If you would like to proceed, in our usual fashion, after you have made your presentation, we will then have a period of questions.

HONOURABLE DONALD J. JOHNSTON

**Hon. Mr. Johnston:** First of all, I want to thank you, Mr. Chairman, and the members of the select committee for giving me this opportunity of appearing before you and discussing the implications of the constitutional accord. I refer to the accord as Meech Lake. That is the common parlance in the country. When I talk about Meech Lake, I am not talking about the Meech Lake

communiqué; I am talking about the accord that emerged from the Langevin meetings.

I say to you that it is not an exaggeration in my judgement to see Meech Lake as creating a legal and political vehicle for the disintegration of the Canadian federation. Ontario, in my judgement, has a pivotal role to play in preventing that from happening.

I was alarmed at my very first reading of the Meech Lake communiqué. If anything, my concern for the future of Quebec and Canada and for the future of the Canadian federation itself has been heightened, not lessened, during the intervening months. I have written, I have spoken and I hope to do so and continue to do so in every part of this country. The purpose of that primarily is to raise the consciousness of Canadians to what is really at stake with Meech Lake. I have an annex attached to my initial notes that I am working from right now, which is essentially a submission I will be making to the Senate.

I will be making it on March 23, I learn. I have used it simply as a source document, to which I hope members will refer. I know you are burdened with lots of material. I know what being on one of these committees is like, but I do hope you will take the time to look at some of the issues raised in the annex, part of which is in a question-and-answer format, where I try to address some of the questions that have been raised so far.

I have received hundreds and hundreds of letters from every part of this country from people who express concern about Meech Lake. These are articulate, well-thought-out letters. These are not the kinds of letters that you as MPPs and I as a member of Parliament often receive in response to some piece of legislation, which are four letters. These are thoughtful letters from Canadian individuals. This has come forward in the absence of any political debate, because all three parties at the federal level have elected to support Meech Lake. The reason for their support, I fear, is they do not want to alienate Quebec voters due to the fact that there is a general election in the not-too-distant future.

I do not happen to share that view myself—and we can discuss that afterwards if you like—in other words, that there will be an alienation of Quebec voters. But I do say to you that the stakes for our country are so high that this has to be raised above partisanship, in my judgement, and we cannot be guided by short-term political expediency.

I believe many politicians who are supporting Meech Lake know in their hearts that it is wrong,



but they have found comfort from various experts, some of whom have appeared before this committee. Today, I want to take the opportunity, instead of repeating the arguments I have made in the annex, of dealing with some of the witnesses who have come before you.

During the first round of submissions in Ottawa, before the special joint committee of the House and Senate, I found many people were coming and making a point, putting forward their particular points of view, but they were not being joined in issue. There was very little debate taking place. It seems to me, having moved here to this select committee, I would like to see more of that debate taking place and that, as I say, is what I hope to do with you this afternoon.

Two people specifically who have appeared before you have had considerable influence in this debate—Wayne Lederman and Peter Hogg, both of whom are recognized constitutional authorities. Professor Lederman appeared before the special joint committee and made representations that were very similar—in some respects identical—to those he made before this committee on February 3. He also commented on Meech Lake in an article in the *Financial Post* of August 31. That article, I note, has also been discussed before this committee.

While both of these gentlemen, Professors Lederman and Hogg, support Meech Lake, their positions are not entirely identical. What I intend to do I think will be helpful in putting forward my own views, if I, as I say, join issue with some of theirs.

These two gentlemen are both distinguished in their field, namely, constitutional law, but I would point out that they have no acknowledged expertise in dealing with the political dynamics of Meech Lake; yet the opinion that has been put forward by Mr. Lederman and Mr. Hogg in both cases represents a mixture of political judgement and legal analysis.

I would caution committee members when reviewing their testimony not to associate their legal expertise with their political judgements. As I point out, you in this committee are politicians. It is you who have a much better position and more expertise to assess the political dynamics flowing from Meech Lake than either Professor Lederman or Professor Hogg.

**1550**

With regard to their legal credentials, I would also remind committee members that there are competing views from learned constitutional lawyers of equal merit. I say this with respect to Professor Lederman's longevity, which he re-

minded us of in the *Financial Post* article where he said he had "been a professor of constitutional law, teaching and studying at seven Canadian universities in five provinces in all regions of Canada, including Quebec, for almost 40 years." I would say that those 40 years of teaching and professorial perambulations, as I call them, do not add weight to the merits of his arguments.

I make reference in my notes to the late, and I would say great, Frank Scott, who certainly did not teach in as many provinces, but I can assure you that Scott, who is a giant constitutional authority transcending even his death, would have found Meech Lake abhorrent, not only to his vision of Canada but also as a legal contribution to the Constitution.

I think this document is guilty of shoddy draftsmanship, woolly thinking and certainly wishful thinking, and all of these were foreign to Scott's concept of constitution-making. It is sad that in this Meech Lake accord so many of his pupils seem to have fallen into the traps which he had revealed to them over many years with impeccable, clear-sighted reasoning. I see that even Pierre Elliott Trudeau, who is not noted for intellectual humility, is quoted in a recent Maclean's article as saying, "Frank taught me everything I know."

But we do not have to look back to Frank Scott. Around us and in this committee we have seen an impressive array of younger constitutional legal experts who take issue with Meech Lake. Let me mention John Whyte of Queen's University, Jack London, Bryan Schwartz, Deborah Coyne, Stephen Scott and Howard McConnell. When one adds to that legal expertise the historical perspective of such pre-eminent historians as Ramsay Cook and Michael Bliss, both of whom I believe have made submissions to this committee, surely we have just cause to challenge the comforting views that have been offered to us by Professors Lederman and Hogg.

I want to examine with you some of the political judgements that have been made by these two gentlemen.

First of all, Professor Lederman assures us that if Meech Lake is adopted as proposed, it would "restore the political legitimacy of the federal Constitution in Quebec." In the same testimony he says: "For the immediately foreseeable future, we see Canada going forward in a number of progressive ways if the accord is put in place. The future is dark and uncertain if it is not put in place." Then he goes on to say, "I would doubt, for example, if there is going to be any progress in aboriginal rights until Quebec is a wholeheart-

ed participant in the requisite future conferences."

Then the most resounding political judgement of all by Professor Lederman: "As I said, this is an extraordinary operation to repair an unfortunate omission in 1982, and a response to what the Quebec government has told us would satisfy it. We think that objective is so important that we do not want to see it jeopardized in any way."

I do not object and no one can object to anybody making political judgements or explaining to us how and why in his or her opinion the moral adherence of Quebec to the Canadian Constitution is significant, but I simply point out that this is a personal political opinion of Professor Lederman and some of his academic colleagues.

Professor Hogg, on the other hand, seems less inclined to get involved with the politics of the Constitution, but he dabbled in politics when he appeared before you on February 2. He tells us in his testimony, which I have read carefully, that the patriation exercise of 1982 "created a profound sense of grievance in Quebec." He advises that Meech Lake answers the question, what does Quebec want? He suggests that Quebec has now said what it wants, "an extraordinarily important development," to use his words.

Now, these declarations by these two professors are not of a juridical nature. They are political judgements, and in my view, naïve political judgements at best.

I challenge the position that there was a profound sense of grievance in Quebec by reason of the 1982 patriation without Quebec's consent. I personally have represented a riding in Quebec, St. Henri-Westmount, since 1978. Approximately 50 per cent of that riding is French-speaking—much of it, in the St. Henri area of the city, unilingual. I am not aware, and I have checked, of any letter or any telephone call received by me or my office from 1982 until 1987 regarding the Constitution. Who is better placed to measure such a profoundly felt grievance, were it to exist: a member of Parliament such as myself, representing tens of thousands of Quebecers, or constitutional lawyers teaching beyond the province with their information sources apparently limited to editorial writers and colleagues in Quebec universities?

Moreover, while the general statement of the Quebec government's demands can be found in the Quebec Liberal Party election literature of 1985, as far as I can ascertain, and again I have done some research on this, the constitutional

issue was never debated or never even raised by either now Premier Bourassa or the then Premier Pierre Marc Johnson during the 1985 election campaign. I want committee members to ask themselves, can we believe that this was a burning issue preoccupying Quebecers when it did not merit any comment during a provincial general election in 1985?

But the most naïve political assumption of these two gentlemen is that somehow the acceptance through Meech Lake of the five conditions demanded by Quebec has laid to rest Quebec's claims. Premier Bourassa has been candid and forthright in his speeches to the National Assembly on this point. He told the Quebec National Assembly that Quebec gave up nothing through Meech Lake and that the Liberal Party of Quebec maintains its position that Quebec can unilaterally separate from Canada at any time.

His minister Gil Rémillard assured Quebecers that Meech Lake was just the first round, that new demands will be made at first ministers' conferences. To quote him, "This is only a first step. There will be further constitutional conferences every year." Remember what Mr. Rémillard has told us. He has been honest. He has been forthright. Meech Lake is only a first step and we can expect further demands from Quebec governments each year.

So much for the political side of it. Now let me spend a moment on some of the legal arguments that you have been inundated with regarding the "distinct society," which have been put forward by Mr. Lederman and Mr. Hogg. Professor Lederman evokes the following points, which I say merit examination.

First, he dismisses the argument that Meech Lake reduces the effect of the charter because, in his opinion, to do so would require an increase in the powers of the provincial or federal parliaments. He invokes the so-called nonderogation provision of the fourth paragraph of subclause 2 to argue that such powers have not increased.

Second, he argues that the charter guarantees under section 1 are only to be subject to such reasonable limits as can be demonstrably justified in a free and democratic society. Thus, he concludes that while the "distinct society" clause will influence the interpretation of Quebec laws, he argues that such has always been the case and that the proposed section 2, and I quote him here, "simply makes explicit what has been implicit from the beginning."

Third, he argues that section 16—which states that certain charter rights, namely, the aboriginal



and multicultural rights, are not affected by the "distinct society" clause—is not subject to the application of that maxim of interpretation, which I am sure you have heard ad nauseam here, namely, "expressio unius est exclusio alterius." To use his words, and I quote him again, "Section 16 is superfluous." That is what he said in his article in the *Financial Post* of August 31.

In arriving at that conclusion, Professor Lederman ignores another canon of construction, namely, that a legislature does not speak for no purpose. There is a strong presumption against any word being superfluous. It would be difficult to convince a court that the entire section 16 is superfluous, as Professor Lederman would have us believe.

In brief, Professor Lederman does not see the "distinct society" clause of Meech Lake as changing the status quo. In his view, and again I quote him, his precise words were, "The government of Quebec, representing the people of Quebec, has said that they would feel better, they would feel more secure, if that which has been implicit were made explicit."

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I have not been able to find where the Quebec government made such modest claims. In fact, the Quebec government's official view of the impact of section 2 is radically different from that proposed to us by Professor Lederman. I will deal with that Quebec position in a few moments.

Professor Hogg, in appearing before you, made a number of slightly different points on the "distinct society." First, he says the provision is interpretative only, conferring no new powers, "so that its chief relevance is really only for when other constitutional provisions are vague or ambiguous."

Second, he attempts to allay the fears of Quebec's English-speaking minority, claiming that the "distinct society" is one in which there is an English minority living along with the French-speaking majority. Therefore, presumably from that he argues that the promotion of the "distinct society" means the promotion of the entire society, including the English minority.

He also expands somewhat on Professor Lederman's implicit-explicit thesis, but he admits that "the 'distinct society' clause could somewhat expand the power of the Legislature of Quebec to derogate from the charter."

The general impression that these two professors have tried to convey is that Quebec has gained nothing except a "nice feeling" from its description as a "distinct society" and, by inference, the role of the Legislature and the

government of Quebec to preserve and to promote the "distinct society" or "distinct identity," the words used of Quebec, must also be virtually meaningless. It would seem that some of the premiers who were concerned about the implications of the "distinct society" clause finally agreed to it, comforted by the assurance of legal experts, including Professor Hogg.

Yet, was it not this very provision, I ask you members of the committee, this "distinct society" clause that caused Premier Bourassa to claim publicly that no other federal state gives to one member of the federation powers which are so clear, so important and so watertight in their interpretation? It was also this provision that he was discussing when he said before the National Assembly, and I quote:

"First of all, we note that with the (recognition of a) distinct society we are achieving a major gain, and one that is not merely symbolic, because the country's entire Constitution will from now on have to be interpreted to reflect this recognition. The French language constitutes one fundamental characteristic of our uniqueness, but it has other aspects, such as our culture and our political, economic and legal institutions. As we have so often said, we did not want to define (all those aspects) precisely because we wanted to avoid reducing the *Assemblée nationale's* role in promoting Quebec's uniqueness.

"It must be stressed that the whole Constitution, including the charter, will be interpreted and applied in the light of the section on our distinct identity. This has a bearing on the exercise of legislative authority, and it will enable us to consolidate what has already been achieved and to gain new ground."

This is the Quebec view. The "distinct society" clause was proposed, it would seem, by Quebec's legal experts. While some discount Premier Bourassa's statements to the National Assembly as political rhetoric, I do not. The language of the "distinct society" clause was chosen with great care and, as the Premier emphasized at the beginning of his comments to the assembly on June 18, the statements and intentions of legislators can be important in constitutional interpretation. Hence, he undertook to be as precise and concise as possible and took care to explain Quebec's position.

Members will appreciate, I think from what I have offered to date and from your recollection of testimony before this committee, that the views of Professors Lederman and Hogg, on the one hand, and those of Premier Bourassa and, I should add, Gil Rémillard, who is also a

constitutional lawyer, on the other, are irreconcilable. It is those of the Premier that will carry weight before our tribunals on legislative intention.

But look at the other side of it. Imagine the outcry from Quebec should one day Professors Lederman and Hogg be supported in their interpretation by the Supreme Court of Canada. Quebec will see itself as having been duped. The nationalists' voices will rise above any kind of rational debate. The cries for independence will be reinforced, especially should the court speak when the spirit of separatism is waxing. Lise Bissonnette, a noted journalist in Quebec, made the point in an article in the *Globe and Mail* in December, and I quote her:

"When women's groups worry that the 'distinct society' clause might override the charter, federal and provincial politicians are quick to reassure them that it will not. Who is to be believed? In Quebec, the "distinct society" is marketed as a meaningful development; in the rest of Canada, it is 'sold' as insignificant. All the joy displayed over this Quebec-Canada reconciliation might expire when the 'government of judges' has its final say."

The alternative scenario is at least as discouraging. In other words, if Premier Bourassa is right and Professor Lederman and Professor Hogg are wrong, and I personally believe that he is right, we are handing a loaded gun to the next separatist government in Quebec, and there will be one day a separatist government in Quebec. The opposition always becomes the government in our system. As Claude Morin, who by the way was the architect of the referendum question in 1980, has said the Péquistes would use the "distinct society" clause to gradually take Quebec out of the federation. You will find in the annex the actual reproduction of the transcript in an exchange he had on a CBC program.

This initial reaction of Claude Morin has been reinforced and in fact was reinforced only days ago by Jacques Parizeau, who is the leader in waiting of the Parti québécois and probably of the next government. If you look at the *Montreal Gazette*, you will see the title, which summarizes exactly what he thought and said. The headline was, "I'd Use Meech Lake in Grab for Powers: Parizeau." Despite these obvious consequences, the premiers and others have been seduced into believing that if Meech Lake is rejected, Quebec will reject Canada.

I say that if you or we fall for that kind of argument, we might as well kiss this federation goodbye because there always has been and there

will always be something Quebec nationalists want, the principal one of course being eliminating the status of Quebec as a province of Canada. We dealt with that issue in 1980 and in my judgement we are in the process of undoing the 1980 referendum results. Meech Lake supporters are unwittingly saying to us, "Quebec rejected sovereignty-association, but we will now give Quebec the means of achieving it anyway."

Unlike Professor Lederman and Professor Hogg, the role of promoting the "distinct society," in my view and in the view of many others, can be seen as doing what the Péquistes or the Parti québécois intends to do; in other words, enabling Quebec politicians to assert jurisdiction over any area of power which is not specifically provided for in the Constitution and which in any way supports the distinctiveness of Quebec. I take you back to Premier Bourassa's comments: That does not mean just language; that means legal institutions, cultural institutions, economic institutions and so on.

And why should they not try? They will have been given, through Meech Lake, the constitutional and moral authority to do that by the people of Canada. Can one envisage any separatist government not exploiting that opportunity to the maximum?

Finally and in conclusion, I just want to say a word about Professor Hogg's view of the English minority's position. He tells us that the so-called duality clause recognizes there are English-speaking Canadians present in Quebec and that they should be included in the "distinct society." That there are English-speaking Canadians of course is an observation of fact, and the role of the Quebec assembly is to preserve their existence, but the operative provision of promoting the "distinct identity" does nothing to preserve rights.

This point is expanded on in the annex. The same obligation of course exists for other provinces with respect to French-speaking minorities. Would it not seem ridiculous to interpret the "distinct society" clause as imposing an obligation on Quebec to promote the interests of the English-speaking minority while other provinces would only be required to "preserve...the existence of French-speaking Canadians"? Yet that appears to be the conclusion to be drawn from Professor Hogg's analysis.

Here, Professor Lederman differs with Professor Hogg. In his comments, he has specifically referred to the "distinct society of French-speaking Canadians in Quebec." There is no room for English-speaking Canadians or any-



body else in that concept of the "distinct society."

Similarly, Premier Bourassa has offered no evidence that English-speaking Canadians would be part of the "distinct society." To the contrary, the whole thrust of his remarks is towards a unilingual French Quebec. As he sees it, "For the first time in 120 years of federalism, Quebec has obtained a constitutional foundation for the preservation and promotion of the French character of Quebec."

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So, far from promoting the English-speaking minority as a member of the "distinct society," the promotion of the "distinct identity" in Quebec would seem to point to the suppression of the English language. Meech Lake has not even been adopted and what do we see to date? From sign laws to education to the compulsory French dubbing of English films to the possible extension of Bill 101 requirements to small business, the present Bourassa government, like its Péquiste predecessor, seems determined to eliminate as far as possible the traces of the English language from the face of Quebec. He has also indulged in further social blackmail, if you like, or political blackmail, declaring as recently as about a week ago that Quebec anglophones would prefer unilingual French signs to social unrest. The Premier's job is to accept the responsibility of doing what is right while preventing social unrest.

I also go into what I call the disastrous political consequences of a French Quebec, which is the direction in which Meech Lake moves us, in terms of the Canadian federation. I will not deal with that now but I have dealt with it in some length in the annex. Let me just summarize it with this question: Do you truly believe that Canadians from coast to coast in this country will accept a unilingual French Quebec while promoting an officially bilingual Canada across the country?

My focus today has been to address some of the implications of the "distinct society" clause and to challenge the opinions which have been offered to you by Professor Lederman and Professor Hogg, but I would not want committee members to be left with the impression that this is the full range of my concerns. Far from it. In fact, if you have the opportunity of looking at the annex, you will see that I deal with a wide range of issues under Meech Lake, but my overall evaluation is spelled out in the annex and I would just like to read it to you.

I put it in this language: "To obtain Quebec's tenuous adherence to the Constitution, they"—

referring to the first ministers—"gave up power and authority to all provinces, but especially to Quebec; they put the amending formula in a straitjacket and in doing so made Senate reform a virtual impossibility; they dealt a mortal blow to a bilingual vision of Canada, moving the country towards a French Quebec in an English Canada; they may have compromised the quality of the Supreme Court; they compromised the constitutional safeguards for linguistic minorities and sexual equality rights and they have put Canada securely upon the road to further decentralization through opting-out provisions and semi-annual auctions at federal-provincial conferences."

Members of this committee, I say to you that this constitutional juggernaut must be arrested before it is too late. Time is short. You in this committee have a responsibility and an obligation not just to Ontario, but also to Canada. I realize it is a very onerous responsibility. Even if you reject my prediction as to where Meech Lake is likely to take our country, at the very least you must acknowledge, as others have, that there are ambiguities, uncertainties and misunderstandings as to what Meech Lake really means.

Eminent jurists disagree. Politicians disagree. From statements made by Senator Murray and Premier Bourassa—you will find them in the annex—it is clear that Quebec and the federal government disagree. Is it appropriate for us to discharge our responsibilities—you as members of the Legislature of Ontario and me as a member of the federal Parliament, and is it a responsible exercise of that trust and mandate from the people who elected us, to transfer responsibility for the meaning of Meech Lake to the courts?

In substance, our premiers and the Prime Minister have said, "In many ways, we do not know what Meech Lake means, but one day the Supreme Court will tell us." That effectively is what the Prime Minister said with regard to this "distinct society" clause. Why not tell us now? Why not a judicial reference by the Ontario government to the Ontario Court of Appeal before Meech Lake is adopted by this Legislature? Then your votes would be taken in full knowledge of what is at stake, certainly with respect to a number of the areas where there is great disagreement as to what the implications are.

I will close with a paragraph that I put in my notes, which is the reason I mentioned Frank Scott. I was recently looking at a biography of Scott. There is a chapter entitled "Take Care of Canada," which I thought when I looked at it would be an appropriate epitaph for Scott as well

as a message to the current guardians of our Constitution. I say to you, that message does not yet seem to have been received.

I look forward to your questions.

**Mr. Chairman:** Thank you very much, Mr. Johnston, for your comments and also for the annex. I can assure you we will look at the annex closely as it expands on a number of the points you raised. I also want to thank you for the eloquence and passion of your words. This is a topic, I suppose, where we sometimes get into the dry discourse of constitutionalism, and I think that your points have come through very clearly this afternoon.

If I might then turn to questions, Mr. Harris.

**Mr. Harris:** Thank you very much, Mr. Johnston. There is nothing wishy-washy about where you stand on Meech Lake as opposed to the wishy-washiness of some of the interpretations that we are getting on various aspects.

Before I get into any details, I want to say I did have an opportunity earlier, late last week, to have some questions of you, and I will not get into too many specifics, but I may come back to them at the end if some of the things are not covered by others. I do want to congratulate you on making the presentation, on speaking out. I want to congratulate you on coming before this committee.

We are having somewhat of a difficulty understanding exactly where we stand as a committee and what powers we do have and what is our purpose. I think the fact that you have come says a lot. The Liberal youth were told they should just meet with the Liberal caucus of this committee, not with the whole committee, and I congratulate you for coming before us all and putting your views on the record. I think it is significant.

I want to ask you, because we are wrestling with it, you may not be aware or maybe you are that there are a lot of answers we are having trouble getting. Le Devoir said yesterday that Ontario, Manitoba, New Brunswick and Prince Edward Island are negotiating behind the scenes to force Prime Minister Mulroney to change the Meech Lake constitutional accord. The story came out of Winnipeg. It said the federation of francophones outside of Quebec is also a party to the secret talks among those four provinces. Are you aware of any of that?

**Hon. Mr. Johnston:** I became aware of the Le Devoir article actually just a few minutes before I began my presentation. It was raised with me by one of the journalists. I am not aware of it. I have had correspondence and discussions with the

various francophone groups outside of Quebec. I am pleased if they are starting to put pressure on these governments.

I would like to emphasize one point. As I have sat through various hearings, there are many groups that have a specific axe to grind. It is quite legitimate for them to come forward and make a point, but I would hate to see a couple of amendments made to satisfy the demands of certain groups and lose sight of the whole forest because, in my judgement, the implications of Meech Lake go far beyond the issue of the anglophones in Quebec, the aboriginal peoples, the Yukon. It is the entire package I hope that this committee will be able to look at in terms of the political dynamics and the road that it is setting Canada on.

I welcome that if it is happening, but I have perceived no direct evidence of it. At the same time, I hope as you meet with these various groups—you have met with some of them—that you will also bear in mind that there is a major issue involved in Meech Lake that goes far beyond the grievances of any one group.

**Mr. Harris:** Thank you. Perhaps, Mr. Chairman, you could ascertain the validity of what is in *Le Devoir*. I think it is significant for our committee, if that is the case and that story is correct. I would like to leave the specifics to some of the other questioners. I have asked a lot of the questions that I have of Mr. Johnston. I will pass for now and see what comes up.

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**Mr. Breagh:** I wanted to set aside the practice that I suppose is pretty common here, that we all become constitutional experts and advise one another on our learned opinions. Basically, I am of the opinion that a lot of the questions about what this word means or what that clause means are pretty much a useless exercise for us. This is not the Supreme Court, and it will be the Supreme Court which does that. Our job as lawmakers is to try to direct the language as clearly to our intent as we possibly can. If we have any skill at all in that regard, there are certain words we use when we draft a bill that we have used a lot, and we know they will stand up in court.

I want to leave the definition stuff aside for a moment and talk to you a bit about two things. One is the process. I find the process whereby we came to this agreement untenable. As someone who believes in the democratic parliamentary process, I cannot defend that process at all, even if you want to call it executive federalism, dress it up and give it some kind of clean title.



Part of what the committee wants to do is to address itself to the problem of what we can do that will give the process of making a constitution and amending it in Canada some credibility. I do not think that the current process has very much in the way of credibility, and it is not helped by the fact that various premiers have said, "We will let this go to a committee, but we will not tolerate amendments." That is pretty alien to our system as well.

I would like to hear for a minute what you have thought about the process. Can the process be rectified? Is the thing so wrong now that there is nothing anyone can do that will give credibility back to the process itself?

**Hon. Mr. Johnston:** I agree with you. I think the process is, as I think you said, untenable. What is even more untenable and unacceptable is that the process that has brought us Meech Lake is now being put into the Constitution as a permanent fixture; namely, the annual constitutional conferences.

That means that 11 Canadians, behind closed doors, making their own tradeoffs, whatever they may be, are going to change the basic law of this country, because you have to combine the notion of this first ministers' conference with one of the political realities of our system, which is party discipline. When a Premier puts his signature on a document behind closed doors at Meech Lake or anywhere else, he is putting his credibility, his cabinet and his caucus on the line under our system, unless it is understood at that meeting that there will be free votes, that they will emerge and have free votes in all their legislatures. That, of course, is a possibility.

I expressed concern with regard to this institutionalization of first ministers' conferences. We have that old saying that the proof of the pudding is in the tasting. Well, we have tasted it. Meech Lake is an example of it, and now we are faced with this juggernaut which emerged from behind closed doors in this untenable process.

Can we correct it? Can we rectify it? I think that was your question. What I would like to see out of all of this is not a rejection, saying that everything is fine and we are going to reject and stop it. What we should do is go back to the drawing board. There have been enough concerns raised about this. There have been enough ambiguities, such as on specific words—and I agree with you that legislators are to do their best—but these are not specific words, these are concepts.

When we have senior statesmen, theoretically, in our system saying, "We do not know what this means, and some day the court will tell us," if it were freedom of expression or other areas of the charter which evolve as time evolves, I can understand perhaps someone saying that. But when you are talking about a "distinct society," and what does that mean to divide Canada into two societies, and does the "distinct society" override charter rights, I find it completely unacceptable that we should say that will become the responsibility of the court. What is our responsibility if it is not to give the kind of guidance that you have suggested and put it in the best language we can?

Indeed, we have to try to rectify it. The way to do it, I think, is to stop this process, go back to the drawing board or the first ministers' conference, bring out all the concerns that have been raised and make sure everybody understands what Quebec's position is. We are all democrats. If we want to have a unilingual French Quebec and an English Canada, we are entitled to have it, but I do not think it should come in the back door through misunderstanding and ambiguity. It should be done up front and we will have a national election on it, perhaps, with parties running on that issue, and we will see who wins. That is the way our system should operate.

It is not too late yet, but it will be too late if this process continues and all the legislatures adopt it. That is why I am hopeful that you here in Ontario will at least take the very modest step which I suggest, namely, why not take parts of it and ask the courts to tell us now rather than later?

**Mr. Breaugh:** OK. I want to pursue a couple of things with you.

**Mr. Chairman:** Mr. Breaugh, would you permit a specific supplementary on that?

**Miss Roberts:** Just very briefly, if I might, Mr. Johnston, you are suggesting that we just stop this here and go back to the first ministers' conference and then maybe have some more discussions or have a national election on a particular issue or a particular set of changes to the Constitution.

Do you have no other information for us or help as to how the process can be changed? Do we wait every five or 10 years and then have an election on the constitutional amendments that we thought up in the last 10 years or something like that? Do you have any help for us with respect to that process?

**Hon. Mr. Johnston:** I have no problem with constitutional conferences, first ministers' conferences. First of all, I do not think they should be

institutionalized and I do not think they should be behind closed doors, because what I see emerging with the experience of Meech Lake is a system of brokerage. As I was saying to someone the other day, it is like sitting down and dividing up an estate. You say, "I would like the grand piano," and somebody says, "You can have it if I can have that chest of drawers and grandmother's picture" and so on.

One senses that this is the kind of thing that took place at Meech Lake. Mr. Peckford said, "OK, but I want fish on the agenda." Mr. Getty said, "I will go along with the 'distinct society,'" but I want Senate reform on the agenda next time." Mr. Bourassa wanted to put a limitation on the spending power and they said, "OK, you can have a limitation on the spending power if we all have a limitation on the spending power." He said, "We want to be able to opt out of power transfers" and they said, "Fine, you can have that if we get it too."

That is what is happening under this process away from public scrutiny, behind closed doors. So my suggestion is, sure, constitutional conferences, wide public debate, free votes in the legislatures and in the House of Commons so that we emerge with truly a national consensus.

**Miss Roberts:** You believe that as long as these constitutional conferences are open, that is a correct way of doing it, even though they are doing exactly the same thing?

**Hon. Mr. Johnston:** Unfortunately, if we let this go and we emerge with a system of unanimity, which means that everybody then is in a position to blackmail, I do not know where that will take us. That is why I would like to see it stopped.

**Mr. Breaugh:** I wanted to pursue a couple of things at the beginning of this process and at the end of it, if I may. At the beginning of the process, I have no means of knowing what any of the premiers' intentions were, there being no records, really, of the conversations and, frankly, an unfortunately small amount of gossip leaking out about what the hell happened behind closed doors as well. There is no way to trace what the intentions of the premiers were when they drafted this. The only thing I can say is that this was not done on the back of a cigarette pack. It was drafted by whatever constitutional legal experts we have working in Ottawa these days, so it was not done by accident or by chance. The words were chosen carefully.

I do not have a problem with the first ministers meeting every six months or every two weeks if they want to, but I think in a democracy I have a

right to know what they are doing there, I have a right to know what the agenda is, and I believe that when they come to the point of making a decision I have the right to be able to observe that process so that I can make my own judgements about who is doing what and what their motives are. The intention is the problem. I am blocked out of that process entirely.

I would like to pursue with you the other end of the process. If you took it just on face value that each province in Canada, on a limited number of things, does in fact have the right to veto, that is one of those rights that you had better not use too often, because we are sitting in a city that has two million people. A lot of our provinces do not have that kind of population base. As soon as the smaller provinces begin exercising their right to veto, even on a regular basis, people are going to talk about representation, so there is that kind of problem.

At two ends of this process, then, I have some difficulty. I want to get your comments on how practical the proposals under Meech Lake really are.

I will tell you before you start that my judgement is that if certain things were done—if aboriginal rights were resolved, if we were able to resolve the charter questions that are in this document, if there was a package of things that happened—implausible though it might seem, this accord does not seem as outrageous to me as it might to some others.

On the other hand, if those things do not happen, the rules of the game change entirely, so that at the end of the process I am left with another untenable political process where people have a legal right, a constitutional right to block, for example, the Yukon or the Northwest Territories ever considering provincial status. That, I think, would be untenable. Without some process work, the first ministers would take what got us into this position, extrapolate it and make it much worse over the next few years. So at both ends of this process I have great difficulty and I would be interested in your comments on that.

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**Hon. Mr. Johnston:** I agree with you. I think the veto process that you are referring to is one which lends itself to leverage. It is not to say that a province would not come in, but if you are going to get a province in and this is all done behind closed doors, I can see a Premier saying, "Sure, we will let the province in, provided we get perhaps part of the province." One of the great concerns at one time was the extension of the western provinces into the territories and into



the Yukon. That has always been of concern to the people in the north.

There is leverage that every province now has with respect to somebody coming through the veto process and, quite frankly, I find the whole thing almost absurd, the kind of structures that we have set up for constitutional evolution. I go into this in some respects in the annex, but what can one say? The whole thing is bizarre. Here we have Prince Edward Island with a veto power. You are saying that if that happens, people will start to question representation. What are you going to do? Have a revolution because we have not provided any mechanism that allows these matters to be sorted out? There is no referendum process. You cannot go to the people.

Every constitution has to be, in theory, a living, growing tree that responds to social and economic changes. This one, if we adopt it the way it is, does not, and that means you can no longer have evolution. As history shows us, when you cannot have evolution, ultimately you get some form of revolution because people are so frustrated that there is no way out of the legal constitutional straitjacket they are being offered.

I would hope this committee will come forward with recommendations on process, and also on how that process can be affected by the specific legal impediments to evolution that are put into this Meech Lake accord.

**Mr. Chairman:** Mr. Cordiano, then Mr. Eves, Mr. Allen, Mr. Offer and Mr. Elliot.

**Mr. Cordiano:** I would just like to make one point and also to thank you for coming before us. There is not a lot of time to get into specific issues, and I do not think we necessarily should be doing that this afternoon.

I would like to deal with some of the concepts you have put forward and some of the notions with respect to Quebec's position within Confederation. The point you seem to be making in part of your brief is that the Quebec Liberal government is at this point in time putting forward a view about where Quebec stands in Confederation. I get the sense, almost, that you are saying that really a Quebec government does not speak for the people of Quebec alone. I would agree with that. We have a national government, and certainly the same people who voted for the Quebec Liberal government voted for their federal members of Parliament. If that is the case, certainly when the referendum was held, Quebecers voted yes for Canada. We know what happened. They ousted the separatist government in 1985. They voted for a Liberal government.

You say not much discussion took place with respect to constitutional reform, but I cannot imagine that within a four- or five-year period the people of Quebec suddenly forgot about constitutional reform or suddenly forgot about the fact that they were not in part of the Constitution. I think that perhaps the average Quebecer had many things on his or her mind. The economy probably was one of the more important issues facing a person living anywhere in Quebec, with the high unemployment rate, etc; but I cannot imagine that no thought was given to constitutional reform. There was some discussion at the very least during those years about constitutional reform and the people of Quebec had some idea about the Constitution and where Quebec stood in place in Confederation.

I say to you that I think the people of Quebec would have voted for a government that was proposing something that was reasonable; and I would say that, certainly in those intervening years, there is at least a view in Quebec that this is what Quebec needs to be a part of Confederation, part of the Constitution.

You have two governments, basically. One is separatist and one made up of members of the Liberal Party who have formed a government. We are sitting here trying to decide what is the right thing. We now have all three federal parties agreeing to this accord, basically. There are dissidents among all three parties perhaps, people who will vote against the accord. At the same time, the people of Quebec voted for federal members of Parliament, the majority of which were Conservative in the last federal election; and then subsequent to that voted for the majority of members of provincial parliament, the National Assembly, who were of Liberal stripe.

We have those two situations and the people of Quebec ousted a separatist government. So we are sitting here in Ontario and saying to ourselves, "What is the right thing to do?" What you are telling me is that the Quebec government really does not have its finger on what people think in Quebec. The federal members of Parliament had no idea about what people were thinking in Quebec, that this is not even an issue in Quebec. That is the message you are bringing to me today.

**Hon. Mr. Johnston:** Yes. Let me add to that. I was responding to Peter Hogg's notion that there was a profound sense of grievance in Quebec. Being a member of Parliament, I point out that no one has ever raised it with me and it

was not raised during the general election. Those are facts.

I think it was there with many of the political scientists, the editorial writers, certainly with the editorial board of *Le Devoir*. But I think if you were to go to the average Quebecker, as you mentioned in the Gaspé or wherever, and say "What happened in 1982?" I do not think the average person would be quite sure what happened in 1982. I do not think they felt they were not part of Canada from 1982, that they were not part of the Constitution.

**Mr. Cordiano:** Those are two separate things, though. Let us make a distinction.

**Hon. Mr. Johnston:** No, but I do not think that was ever a burning issue with them, but it has been made an issue. It has been made an issue by the political process. It has been made an issue by Mr. Mulroney and by Mr. Bourassa.

You made a point which I think is a very important one that I would like committee members to reflect on. You said, "Who speaks for the Quebec people?" You pointed out that the Quebec people said yes to Canada in 1980 in the referendum, but the Quebec government, which spoke for the people of Quebec in 1980, said no to Canada. They were the ones who put the question. They put the question as to whether they should have sovereignty-association, which was their option, and they went out and fought for it and used taxpayers' moneys to promote it and they lost.

It was the people who spoke. People are not speaking on this issue. I must say I would feel quite different about this issue had this been fought out, say in an election campaign in Quebec; had there been face-to-face debates and had the points been laid down that Mr. Rémillard laid down in Mont-Gabriel in the spring of 1986. That never happened.

Let me just make one other point. This document actually even goes further than the points Mr. Rémillard asked for. I think it was Alex Macdonald, the former Attorney General of British Columbia, who came before the Senate a couple of weeks ago and said, "Quebec came in, negotiated hard for five points and emerged with six." That is, with five demands and got six or whatever.

Anyway, I think the point you make, though, is one that we all should think about in this process. When you are changing the basic law of the country, who speaks? Should it not be a firm mandate?

**Mr. Cordiano:** But should we have a referendum on constitutional reform every time

we are going to reform the Constitution in any fundamental way?

1640

**Hon. Mr. Johnston:** I think we should at least have an election. We have toyed with the notion of the referendum. You may recall back in 1981 that Mr. Trudeau proposed a referendum, and it was unacceptable to the provinces because the provinces feel that the feds should not be able to reach over their heads to the people to defeat them on an issue. I think there are two sides to that argument in terms of changing the basic law of the country, but if you accept my view that you are basically changing the direction of the Canadian federation, surely to God we should at least have an election on the issue up front where the issues are fully exposed.

**Mr. Cordiano:** I think it is accurate to say that there was some discussion at the very least. You are implying that in the 1985 election this was not an issue at all, and I would say that there was at least the proposition that the Quebec government, the Liberal Party, would put forward a set of constitutional reforms and that there was a concept at least envisaged there from that time until now.

**Hon. Mr. Johnston:** The facts are that in the election literature there was reference to the notion—the five points were not spelled out—to the notion of input into the appointments to the Supreme Court, the notion of recognition of a distinct society; and we in the Liberal Party, in November 1986, after this had become an issue, had a very major debate—you may recall it—as to what we would be prepared to accept. We had caucus meetings and we had meetings in Quebec in the conseil général, and we came up with a resolution which we understood was acceptable to the Quebec government, to M. Bourassa.

In that resolution there was a recognition in the preamble to the Constitution of the distinctive character of Quebec as the principal but not the exclusive source of French language and culture in Canada. Then it was referred to as a distinctive characteristic or character and it was circumscribed as to what it meant, the principal but not the exclusive source of French language and culture in Canada, and it was not an operative provision or an interpretive provision to the Constitution because there are elements in the Constitution presently which flow from that, such as section 133, section 93, section 22 and so on.

**Mr. Cordiano:** Would you agree with that? I think you agreed at the time with respect to that.



**Hon. Mr. Johnston:** Sure I did. I supported it.

**Mr. Cordiano:** Then that notion was brought forward.

**Hon. Mr. Johnston:** That, we thought, would meet Quebec's concerns so that we would all live happily ever after, but what emerged from Meech Lake is light years beyond that. It is the recognition of a distinct society in Quebec, of French-speaking Canadians and a role given to the National Assembly and to the government—that is important by the way; I do not know whether that has been raised here, but the role given to the government is essentially for international dimensions because that flows from the executive and not from the assembly—to promote Quebec's distinct identity, which is an unequivocal statement really of two Canadas and a province which is told, "Promote your distinct identity; make yourself as different as possible from the rest of Canada," which is exactly what the Parti québécois platform was, that they should assert national affirmation by perhaps changing Quebec into a republic within the federation; different institutions and so on, control over communications.

**Mr. Cordiano:** What you seem to be suggesting is that there is really no difference between what the Liberal government of Quebec today is suggesting in notional terms from what the separatist PQ government was saying under René Lévesque.

**Hon. Mr. Johnston:** Actually this goes further than what M. Lévesque asked for at the time. As you may recall, in April 1981 the gang of eight signed a package. There were two provinces that were not involved in that deal, Ontario under Mr. Davis and New Brunswick under Mr. Hatfield, and essentially the package that was signed—that is why you keep hearing about how Quebec lost its veto because he went with the amending formula, which was seven provinces and 50 per cent of the population, so he lost his so-called veto, and in return they agreed that any transfer of powers to the federal government would result in any province being able to retain the power and get full compensation. That is one part of this package available to all provinces, but it is much greater than that.

One could argue from the record that M. Lévesque would have signed on immediately if he had been offered this package of constitutional goodies, but I think the other side of that argument is that he was dedicated to separate Quebec from Canada, so it is unlikely he ever would have signed anything. None the less, on

the record he never asked for anything that went this far.

**Mr. Cordiano:** What you are saying is that the intention of this government would be much different; I would assume that. There is certainly no question about—

**Hon. Mr. Johnston:** I think Mr. Bourassa and Mr. Rémillard are federalists. They speak in terms of a federal system, but they believe, from everything they say, that you can have a Quebec that is unilingually French as a member of a federation which is essentially English, that you can have special powers and special status for Quebec which will create a kind of confederate relationship with the rest of Canada and that this is a viable option.

I believe they sincerely do believe that. That is a vision of Canada which is a legitimate view and which should be the subject of this debate. But make no mistake about thinking that it is going to be anything other than that. That is why I worry about Mr. Lederman and Mr. Hogg. They say, "Oh no, it will not be that way." Mr. Rémillard and Mr. Bourassa are quite clear that this is where they want to go, and I do not think the country can survive that kind of federation. That is only my opinion, but that is the kind of debate we should be having.

**Mr. Cordiano:** One final point: whether or not one agrees with your opinion, I think we would have to say that certainly there is a certain view in Quebec that would still hold true, because this is an ongoing discussion; to some degree there has been an ongoing discussion. At least now you have a government in Quebec that I would say is much more moderate in its demands. You do not seem to think so, but from my perspective, from where I stand, and certainly from the perspective of many others in Ontario, you have a government in Quebec that is far more moderate than the government of the Parti québécois separatists.

**Hon. Mr. Johnston:** Mr. Cordiano, let me make a point: I think you are right, but when you draft a constitution you draft it in view of what could happen, not what you would like to have happen or who has been sitting around the table. In other words, the constitutional safeguards should be such that you could have 11 idiots at Meech Lake and the public interest is still protected. That has been jeopardized by Meech Lake.

This package, for example, may be quite neutral in the hands of Mr. Bourassa. I think he will ask for certain things where he thinks Quebec should have additional powers and

authority. I do not think they will be outrageous. But you are going to hand this, which I refer to in my notes as a loaded gun, perhaps to Mr. Parizeau. Do you think Mr. Parizeau is not going to test the limits of the "distinct society," the role of Quebec and of the government and to explore those limits to the maximum?

Let me give you some examples. Quebec has complete control over cultural affairs. The government has an obligation to basically promote that "distinct society." What would prevent the Péquistes from saying, "We want an ambassador to the United Nations Educational, Scientific and Cultural Organization if UNESCO will have one"?

How can somebody from Ontario, as Minister of Communications, speak for the distinct French-speaking society in Quebec internationally? That argument is already being made. As an area of communications, why should Quebec not have complete control over domestic communications and eliminate the Canadian Radio-television and Telecommunications Commission? I use that example in my annex. Then think about the implications for federalism. We have the CRTC right now. The chairman is André Bureau from Trois-Rivières. Do you think the rest of Canada is going to accept Mr. Bureau from Trois-Rivières should Quebec assume full control over its communications within the province? He would be able to regulate licences and content across the country, but he cannot do it in the "distinct society" from which he has come.

I think this is taking us down the road bit by bit to an unmanageable federation. I use those as examples but we can extend them into many other areas as well: the granting councils, research, education. I think we have to think what could happen, not what we would like to happen or what we think will happen. That is what constitution-making is all about.

**Mr. Eves:** Mr. Johnston, I again congratulate you for having the courage of your convictions and your nonpartisan approach to this issue. Like my colleague Mr. Harris, I had an opportunity to talk to you a little bit about this late last week, but I think it is important that we get a few points you made last Friday, I believe, on the public record. Your view, I must say, is a very comprehensive and a very in-depth one. It is not specifically tunnelled or focused as many of the delegations have been. That is not taking anything away from them, but you are looking at the picture as an overall picture whereas many of the delegations

and witnesses who have appeared before us have not.

**1650**

I want to start out, first of all, with a discussion about partisan party politics. I for one, as an elected member, believe that there are some issues that absolutely transcend partisan party politics. Abortion may be such an issue. I certainly think an amendment to the Constitution is such an issue. I gather from the comments you made earlier that you would be absolutely in favour of a free vote in all the legislatures and the House of Commons on this issue.

**Hon. Mr. Johnston:** I would indeed.

**Mr. Eves:** With respect to process and the appropriate process—there has been a lot of discussion in this committee about this, about what has gone wrong with the process so far and how we could avoid that in the future—now we have at least a report, unsubstantiated so far, that there are some other secret negotiations going on among four of the provinces to try to amend the Meech Lake accord and persuade the Prime Minister of Canada to do so.

It would seem to me that there is a great deal of common sense to the suggestion of judicially interpreting the Meech Lake accord or parts thereof and having public input and debate before anybody signs such an agreement or an amendment to such an agreement in the future. I think that would almost go without saying. I think that if the accord will not withstand those kinds of tests, my reaction would be: what is it worth and where is the good faith and the understanding that lies behind the accord?

What are your comments with respect to the process and whether or not it should be able to withstand the test of judicial interpretation and public debate?

**Hon. Mr. Johnston:** I agree with everything you said. One of the reasons I have seized these opportunities, as when we met last week and discussed it, is because—one of the principal reasons I am here is that you people are in a position to do something about Meech Lake. I have calls and letters from frustrated Canadians all over the country because there is no point where they can essentially have input into this system except through you, through the legislators.

The federal Parliament, as I say, has gone, so there is a lot of national focus on what is taking place in this committee, and if this committee does not act to change Meech Lake, then the focus will shift to Manitoba and then it will shift



to New Brunswick. Literally, we are talking about millions of Canadians. Some of the media people will tell you, if you talk to them, that they think if a poll were run today, there would be a lot of concern—it might break down about 50-50—and this is in the absence of any real public dialogue.

How many people walk up to you on the street and say, “I am worried about the Constitution”? Not very many, because it is only when it is brought to their attention—and we are not bringing it to their attention; federally, we have abdicated that responsibility.

All I can say to you, Mr. Eves, is that there is a big role to play here in that regard, to get the issues out, to get public dialogue going; and you are able to do something about it.

**Mr. Eves:** I have one further point, and that is that we have heard, as I said, from numerous delegations that have specific interests. One of the very first witnesses we heard from was Professor Beverley Baines of Queen's University.

**Hon. Mr. Johnston:** Yes, I have read her testimony.

**Mr. Eves:** She was concerned about equality rights.

**Hon. Mr. Johnston:** She came right before Mr. Lederman, as I recall, on the same day.

**Mr. Eves:** That is right. She was also concerned about charter rights in general, and she came to much the same conclusion as you, that if this committee did nothing else, I think was her parting comment, it should at least, if it did not have the intestinal fortitude to recommend changes, suggest a reference to the Ontario Supreme Court with respect to interpretation of section 16, which some experts say means nothing and some say is only there to clarify and others say, “If it means nothing, why is it there?”

Given that and given that perhaps a court reference could resolve those problems, there is still the issue out there of the rights of individuals in the territories, be it the Northwest Territories or the Yukon. There is still the issue out there of aboriginal rights and their recognition at future constitutional conferences, their pursuit of self-government that is not even mentioned in the accord. There is still the much bigger issue out there of the reduction of federal powers through opting-out provisions and the term “national objectives” as opposed to “national standards” and so on, which really cuts to the thrust of your basic argument as well.

I asked you this question before but I would like to ask you again, to get it on the record of this committee, how is the reference going to solve those problems?

**Hon. Mr. Johnston:** Let me tell you how I see it resolving them. It is not going to resolve all the issues. There are many things in the accord which you could never make a reference on. It is perfectly clear that the judges are going to come from lists furnished by the premiers. It is perfectly clear that the senators are going to come from lists furnished by the premiers. We can all debate whether that is good or bad, but the Supreme Court is not going to deal with those kinds of issues.

For example, there is the issue of the “distinct society” clause and its relationship to the charter. We all know, who have had any intelligence coming out of the meetings at Langevin, that it was a nonstarter for Quebec. People wanted to say that the charter will prevail. Quebec would not accept it. That is why it troubles me when I hear Professor Lederman, because I know that Quebec has a different expectation. That does not mean that Quebec wants to run roughshod over all the rights in the charter. It is simply that to the extent of promoting its distinct identity, if there is a conflict between its legislation on sign language, for example, and the charter, which may very well end up protecting signs, that it wants to be able to prevail and have those arguments available.

I come back to the point. If there is a court reference, and the Supreme Court of Canada announces to the Canadian public that yes, in certain circumstances the Charter of Rights can be adversely affected by the “distinct society” clause, yes, the national objectives, say, under the spending power will be set by the provinces, as Mr. Bourassa has said they will be, behind closed doors at Meech Lake or wherever—if that is the reasonable interpretation, then my hope is that Canadians will finally say, “Gee, what is happening here?” because they are not aware of these things at the moment, and force us as politicians, and Mr. Bourassa and the premiers, to go back to the drawing board and start to rework all of the issues; not just those specific ones, such as the court appointments—Mr. Bourassa never asked for those court appointments, for example; also, on the Senate side, I think Quebec probably would be quite flexible in revisiting those. But there is this myth out there that this is a seamless web, as Senator Murray says, and that if you pull one strand of it, the whole thing is going to fall apart.

I think that basically we should try to stop it through the judicial reference, stop the juggernaut from proceeding, and then go back and reopen the debate on all these issues and see if we cannot improve the accord in all of its dimensions.

**Mr. Eves:** Thank you.

**Mr. Allen:** Whether Mr. Johnston has been partisan or nonpartisan in coming before us and saying what he has said is perhaps neither here nor there. He certainly presented us with a challenge to constitutionalists that probably is unprecedented in this country: to devise a constitution which 11 imbeciles or idiots could work without getting into trouble.

**Mr. Breaugh:** Present company excepted.

**Mr. Chairman:** If there were 11.

**Mr. Allen:** I must say I, like Mr. Cordiano, was very struck and rather taken aback by your suggestion that the issue really had not been particularly strident or lively in the post-1982 period in Quebec and that there was not much interest in constitutional matters.

I would certainly concede that separatists were dejected and therefore were not really having much to do with this kind of debate; and secondly, that those on the federalist side were still waiting for Mr. Trudeau to come across with his much-vaunted promise made in 1982 during the referendum debate, which never of course did materialize. In that sense there perhaps may not have been much happening.

I do not get all that many letters about constitutional matters, and I do not even get much about free trade when you come right down to it, so I am not sure that those measures are very important. I am not sure that the fact that the two contenders in the context of Quebec itself did not raise the issue is particularly significant either. But I think it strikes all of the members of this committee as rather significant that Quebec absented itself from 1982 on from all federal-provincial gatherings and that the moment Mr. Bourassa was elected there was the Mont Gabriel discussion and the five points came forward; that did not come out of thin air. Your own caucus, as you said, got quite exercised and engaged in the question very quickly. And the French members were often wanting to push the matters further than other members of the caucus wished in terms of response to the five points and the definition of where Quebec wanted to go.

As I say, it took me aback to hear that language. I wondered whether you were not

really overstating the case in order to make some points with us.

**1700**

**Hon. Mr. Johnston:** No. If someone can produce contrary evidence, I would be very pleased to look at it.

**Mr. Allen:** I thought I just listed some.

**Hon. Mr. Johnston:** Sorry. I do not think I have overstated the case at all. One of the issues you raise, which is one we hear frequently, is that Mr. Trudeau made all kinds of promises during the referendum debate which were never acted on. Yes, indeed, he said there will be constitutional reform. But I do not think Mr. Trudeau ever said—

**Mr. Allen:** He would respond to Quebec.

**Hon. Mr. Johnston:** —that there will be special status for Quebec under any constitutional reform.

The whole patriation package and the Charter of Rights and Freedoms and the extension of French language rights across the country—for example, education wherever numbers warrant, which we wanted to get out for these minority groups everywhere in Canada; the application of the first language learned and the Canada clause to permit mobility and to permit people to be educated across the country; the opting-out provision for transfer of powers on cultural educational matters—were all responses to Quebec. You might argue that latter one sort of pushed special status, but Quebec was not named. If Ontario wanted to opt out, it could as well.

But never did Mr. Trudeau ever suggest that there would be a package presented to Quebec which would provide Quebec with powers that were different from or greater than those of the other provinces. Indeed, the focus essentially was on bringing Quebecers and French-speaking Canadians firmly into the political, if you like, and economic mainstream of Canada through making a constitution that would be their constitution; Canadian, no longer Westminster, and us giving them these mobility rights that they so badly wanted.

I would contest that. I hear it all the time, so I am not blaming you for it, because I hear it from my colleagues in Quebec; but I do not recall anybody ever making promises of the kind that we have seen in these five points.

**Mr. Allen:** That was not the point I made, and I did not use the term “special status.” I know Mr. Trudeau’s celebrated views on that question, and your own. The point is not that he made a lot of



promises or that he promised special status but rather that in intervening in the referendum debate, he made it quite clear that there would be constitutional reform and that it would respond to Quebec's needs.

**Hon. Mr. Johnston:** And that is exactly what he did.

**Mr. Allen:** Then you have to ask again, who speaks for Quebec? Those who were elected provincially, both at the time and subsequently, have rejected the proposition that he did respond to it. I know federal members from Quebec took it upon themselves to speak for Quebec at that time, and they had a certain legitimacy in doing that, but they are only part of the voice of Quebec in this federation.

Whatever anybody looking back at Mr. Trudeau's words could have imagined he was thinking, it would be very difficult in the context of a Quebec, which in recent history has sought special powers and been supported both at the Liberal and PQ levels in that endeavour, to believe that something was not indicated in those remarks of Mr. Trudeau, whether he intended them or not, and that that remained on the agenda. That is why, when the Liberal Party came to power and formulated its requests in that respect, it put them in those terms.

I do not see how one can avoid that understanding of matters.

**Hon. Mr. Johnston:** I guess a lot of my difficulty is what special powers are we talking about. For example, some of the supporters of the accord, such as Profession Beaudoin at the University of Ottawa, say that Quebec is a distinct society because of different language, different culture and different educational institutions, basically, and that it should have the powers necessary to promote and protect that distinct society.

My understanding of the Constitution, which is also supported by Mr. Beaudoin elsewhere, is that Quebec has all those powers. That is why we have a federal system. That is why Sir John A. wanted a legislative union and George-Etienne Cartier would have no part of it, because they wanted to be able to protect the distinctive character of Quebec in education, culture and language. Well, it is there. Everybody is supposed to discuss powers, but what are we talking about in terms of powers?

If Quebec had come forward with its five demands and said "‘Distinct society’ means we want full powers over communication but we want international powers in these areas," then we would have something in front of us that we

could sit and debate and discuss, but that is not what we are doing. We are saying we are giving Quebec—I think we are, but Mr. Lederman does not—undefined, unspecified powers which, through its role to promote its distinct identity, it will gradually apply over a period of time. None of us knows what they are. Only the Supreme Court will tell us whether any particular power grab, as Mr. Parizeau calls it, is legitimate. I object to that process.

I disagree with special status, as you know, as you mentioned, but that does not mean my views have to prevail. I am saying that if we are going to have special status, for God's sake at least let us know what it is and vote on it.

**Mr. Allen:** Quebec, of course, did come across with five points. None of them included those more dramatic elements of national status which you are referring to, a national power.

**Hon. Mr. Johnston:** It was explicit recognition as a distinct society and from that—

**Mr. Allen:** When you described this as revolutionary and not evolutionary, again I have trouble. If you look at element after element of the accord, and you just referred to a couple of them, do you not discover that they reach back into the Trudeau years? For example, you people in 1978 had your white paper and bill, which included provincial participation in the appointment of Supreme Court judges. You proposed a Senate that would have been half provincial, half federal. You had a whole series of propositions there that underlie some aspects of the accord.

**Hon. Mr. Johnston:** Bill C-60.

**Mr. Allen:** Whether the government that you were a part of or Mr. Trudeau accepted the language as special status, it has been part and parcel of Canadian federalism for provinces to evolve in some measure differentially. From the very beginning of their association, they came into the federation with different powers. The language of trying to find a way to describe what Quebec was in the federation was distinctive; it was an ongoing task somehow at every level of federal-provincial encounter. The fact that incorporating just simply language relating to distinct society and that the provincial government has some special role in maintaining and promoting that does not seem to me to be a dramatically revolutionary step.

For the rest of your fears, can they not be taken care of in terms of the traditional dynamics that go on in a federal system? Obviously, Quebec in the past has exercised these claims that M. Rémillard and M. Bourassa say they will now

follow. They have their political agenda to fulfil; they have the politics of grandeur to play out in Quebec to exaggerate what they accomplished at Meech Lake, just as in the rest of the country where there is apt to be some backlash, the provincial premiers have got an interest in playing it down. When you go around that circle, are we really in a very different situation than we have been historically all along anyway?

**Hon. Mr. Johnston:** Let me make one thing clear before I come to some of the specifics. When I said revolutionary as opposed to evolutionary, I was talking about the road we are placing Canada on in this sense, that Meech Lake is like a one-way ratchet towards decentralization of the country, towards a true Confederation, if you like, with Ottawa being a kind of servant of the provinces for the purposes of taxation and distribution of moneys for provincial programs. Over periods of time in Canada, you have seen where there has been an ebb and flow of powers federally and provincially back and forth. We have had very significant transfers of powers—unemployment insurance back in 1941.

1710

What I am saying to you is that this Meech Lake accord, if it is adopted and becomes part of our Constitution, will not permit any flexibility in terms of, say, transfers of powers back and forth between the various jurisdictions, as we have had in the past. It is a one-way ratchet towards decentralization.

Let me offer you an example. If this had existed in 1940—I guess unemployment insurance was 1940—do you think a province like Ontario, looking at it from the political dynamic point of view, would have agreed to transfer unemployment insurance to the central government if it had had the option of being able to keep unemployment insurance and be fully compensated for it by federal tax dollars so it could run its own programs, set its own standards and so on?

My view, which is almost political axiom, I think, is that politicians by nature are interested in the acquisition and exercise of power and seldom, if ever, do you see any politician voluntarily give power to somebody else. I have never seen it. I am saying with regard to this Meech Lake approach, and I want you to rise above the fact that your interest is Ontario, in the long term, long after we have gone, do we want to leave a country where the dynamics are such that there is no incentive at any time to transfer powers to the central authority?

In fact, if you do a *reductio ad absurdum*, theoretically, with the appointment of senators

by the provincial premiers, you are actually going to have two Houses 50-50 in Bill C-60. You would actually have, in I do not know how many years, an upper chamber of equal authority to the House of Commons, except on money bills, which would be appointed entirely by provincial governments; not by regions, not by the people of the provinces but by provincial governments.

In other words—for example, the immigration clause: take a Péquiste government in Quebec with an immigration agreement that is constitutionalized, which says the reception and integration of all immigrants shall be carried out by the province and they will get the money from the federal government, from federal taxpayers, to do that; that is what is provided for.

If Mr. Parizeau was the Premier of Quebec, how much do you think immigrants are going to know about Canada when the reception and integration of all immigrants are going to be vested with the province? I only throw these out as examples to you. What I am saying to you on evolution/revolution is that we are creating a situation where you remove flexibility from the system and people become frustrated. That is why I say you get revolution. Our Constitution should be capable of adapting to these changing socioeconomic circumstances over the next 50 or 100 years. I do not think it is with this approach.

But I think you have made some points, by the way, in terms of what was offered by Mr. Trudeau in the past—the appointment of Supreme Court judges, the Bill C-60 limitations on the spending power—but they were all done discretely, a tradeoff of one thing against another to try to make the system operate better. We do not have that here.

**Mr. Allen:** You raised the question of spending power and the shared-cost programs and you referred to UIC. That kind of program obviously predates the era of post-war, shared-cost programming in general. In a sense, it is not a very good example of what the—

**Hon. Mr. Johnston:** Mr. Allen, I am not talking about it as a shared-cost program. I am talking about it as a transfer of authority.

**Mr. Allen:** Yes, quite; but that occurred prior to the era of the shared-cost programs as we know them.

**Hon. Mr. Johnston:** That is right.

**Mr. Allen:** What I am wondering about the shared-cost programming as outlined in Meech Lake is whether it really is very different to what your own government and Mr. Trudeau himself



explained when he rationalized those kinds of programs in 1969, 1970 and 1971. Is it not unlikely, even under your own government, that this kind of transfer of UIC would have taken place simply because you were into the post-Pearson era after the first initial, big major kind of pension plan exercise, which allowed Quebec to do its own thing. Once you got into those precedents, you were not likely to get out of them.

If we got into them and could not get out of them, in terms of precedents, what is there really so bad about Meech Lake other than simply it consolidates that simple approach to federalism?

**Hon. Mr. Johnston:** No, I do not agree with you. I think it is a major departure from the approach to cost-shared programs for several reasons. I will agree that, say in post-secondary education, we have seen an example effectively of what Meech Lake would be like; in other words, block transfers of funds to the provinces without criteria attached so that you end up, in the case of some provinces, with the federal taxpayers paying over 100 per cent, believe it or not, of the educational costs of post-secondary education. That was not the intent of it, but that could be corrected because those agreements come up for renegotiation.

But my concern, for example, and this is a personal hobby-horse of mine, is that I think we need a national consolidation of income support systems in Canada as final relief. I tend to move towards some form of comprehensive income security system which no one level of government could afford and which I think requires national standards, which obviously have to be agreed upon by both levels of government.

I do not see that ever happening now under Meech Lake because Quebec would never agree to it. Quebec would say, "Give us the money and we will run our own income system." The federal government cannot set the national standards or national criteria under Meech Lake. Quebec says that as long as it has a program that is compatible, which is the language used—no one knows what that means. Does that mean it just is not incompatible, is not in conflict?

The result of that, Mr. Allen, and what concerns me, is that I think the federal government will not embark upon any such programs. It is not a question of having the provinces take the money and run. I think the feds will say, "Look, if we cannot have it this way, it just will not happen." There may be bilateral agreements then, province by province. The whole kind of national vision of the country, which I think is

greater than the sum total of provincial visions, I fear is going to be eroded.

**Mr. Allen:** It certainly is a legitimate concern and I appreciate the vigorous exchange on it. I would like to pursue it but I know we do not have all afternoon and you probably have other questioners, Mr. Johnston.

**Mr. Elliot:** There are a couple of things I would like to comment on specifically. To lay out a bit of background for where I am coming from on this, perhaps I am one of the people on the committee to whom your arguments should be directed more directly than to some of the others. Since I was just elected last September 10, and our sixth-month anniversary is coming up this week, I feel this is a terrific learning experience as far as committee work goes in coming to grips with a very important Canadian question.

By your references, you are aware of the fact that we were briefed very completely, as a committee, by experts the first week. We have heard from a variety of other people who have come before us, a lot of them with a very directed point of view from their own particular concern, as opposed to the overview which I would like to thank you very much for giving us. You obviously have looked at the whole picture and have put the thing in context in a way or from a point of view that a lot of the people have not been able to do because they do not have your particular background.

In doing that, a number of things are new information to me as a committee member. For example, I always felt there was a profound sense of grievance in Quebec and you stated that this, in your experience, is not the case. That kind of new information is very valid to us.

The other thing is with respect to process. You have stated very succinctly that the type of process that was involved in getting this committee working as it is working is not satisfactory any more. That is shared by the native peoples' groups that have come before us. When the territories talked to us, they shared that kind of concern. There were women's groups. I expect the disabled groups that are coming in this week will be talking about the same kind of thing.

Those of us who are sitting here are listening to all the evidence with a view to preparing a report to the Legislature that should be delivered no later than June. How that report is going to be framed, we have not even addressed yet. We are weighing the different testimony.

The group that testified before us and that I found more divergent from your particular point

of view than any others was the alliance of English-speaking Quebecers, which came in and presented a very logical argument from its point of view, which surprised me just a bit because it claimed to represent 800,000 English-speaking Quebecers. There seemed to be a sense, even though they did point out all the examples you did with respect to your disenchantment with the accord, that they would somehow overcome those pointed disenchantments and somehow come to some sort of resolution with the French-speaking majority.

1720

My real question is, in trying to accommodate that kind of presentation with your own with a view to going on—I view this, as you have stated a number of times today, as an evolutionary process. The Constitution itself was repatriated fairly recently and the charter was in 1982. This is the very first amendment to that and we go on from here.

We do not want to ratify or do anything with this until June 2, 1990, if my information is correct. We have two years and three months in that interval of time. From an evolutionary point of view, perhaps you would care to comment on it. In that kind of time frame, how could we as a committee best go about reconciling the differences in these two, which I find very divergent, points of view? One is sort of an accommodation kind of thing with what is on paper already. Yours says that it is not valid in almost any part and that we should reject it and start building all over again. Those two things are causing me a lot of concern at the moment.

**Hon. Mr. Johnston:** I can understand that. I am not saying we start all over again. Let us take the profound grievance I referred to. I was making an observation of historical fact, which I would be prepared to debate with anybody. The issue we now have to deal with and which will be put to you is, if you reject this out of hand, there will be a profound sense of grievance. I think that how this Meech Lake is now dealt with has to be a very sensitive issue, for some of the reasons we discussed, in terms of Quebec.

I have gone to French-speaking audiences in Quebec and on French television and so on, and they say, "You say we are not a distinct society." I say, "That is not the issue." I happen to like the distinct society. That is why I live there. As a sociological fact, Quebec is a distinct society. There are other distinct societies in Canada as well. The issue is, should this be part of a Constitution and should additional powers flow from it that create a special status for Quebec and

that also give a collectivity, namely a French-speaking majority, the right to suppress a minority; or outside Quebec, an English-speaking majority the right to suppress a minority?

I happen to be a Liberal, as you are. In liberalism, individual rights should never be subjected to collective rights, by definition. That is the whole purpose of the Charter of Rights, so an accommodation has to be found there. I think an accommodation can be found that would be quite acceptable to Quebec provided the message is delivered properly, and that is the danger, provided it does not appear there is a rejection of the notion that Quebec is different and is a distinct society, because sociologically it is.

The question is, should that be part of a constitutional document, frozen in time for all time, from which different rights and obligations flow, so that we have a country where the rights of individuals in one part of the country are different from those in another part of the country. I say no, we cannot have that and I do not think most French-speaking Canadians want that. But that is the risk we run with this approach to Meech Lake.

As far as the alliance and others you have heard from are concerned, I think they are toughening their position a little bit. They were very reasonable. They hope to work out an accommodation and so on, and I accept that, but I have told them I think they have to be a bit stronger in their representations, and I think they are getting a little stronger in their representations.

We all like to be accommodating. The English-speaking people in Quebec, in my experience, are doing a great deal to promote, if you like, the French language in Quebec. If you talk to your Quebec friends, I would be surprised if you would find any of them whose children are not fluently bilingual today, which certainly was not the case in my generation. They are in French schools. You have immersion programs elsewhere, but in Quebec there is a real effort of those English-speaking people who have stayed to essentially accommodate the francophone majority you refer to.

But I do not think you should ever allow, in your Constitution, collective rights to dominate individual rights in the name of accommodation. History is replete with examples of where you have a tyranny of a majority which becomes entrenched over a period of time. That is why I say, in my judgement, those English-speaking rights and all other minority rights—the sexual



equality rights and francophone rights—across this country are not adequately protected under Meech Lake; and if so, these individuals rights—I would hope this committee will come out and say, “Look, we want to defend by an amendment the rights and liberties of individual Canadians in keeping with the spirit of the charter.”

**Mr. Offer:** Thank you very much for your presentation and response to the questions. Most of my questions have already been asked, but I have a question. In dealing with some of the responses, it is surely not the position that the Charter of Rights guarantees rights absolutely, certainly because of the existence of section 1 that speaks to a limitation.

I think it was in response to Mr. Harris’s question, one of the first responses, that you talked about a distinction in dealing with allowing the courts in an evolutionary way to interpret the Charter of Rights, yet that ought not to be the case with respect to the accord.

**Hon. Mr. Johnston:** With respect to the distinct society.

**Mr. Offer:** Can you expand a little bit as to why it ought not to be left to the courts in an evolutionary fashion in drawing the impact of distinct society in keeping with the Charter of Rights, the guarantees and the limitations as indicated there?

**Hon. Mr. Johnston:** These are issues or matters of degree. You may recall that when the charter was created there was a great debate in this country about whether we were not transferring too much authority from the legislators to the courts, and that debate rages on. There have been disappointments in some cases. There has been rejoicing by some groups at the result of court interpretation and, as I say, in other cases there has been great disappointment.

I only need to cite, for example, that the New Democratic Party was upset because of the right to strike, which was said not to be part of the right of association under C-124, as I recall the judgement. It said, “This is not what we expected.”

I was in debate with Mr. Romanow and some others on that issue, and the point I made was the charter at least allowed that day in court, otherwise the law of Parliament would have prevailed. There is no right to strike, period. At least there was a charter challenge. Now, you can say, “Well, maybe the charter should be amended if the public feels that the right to strike should be fundamental right of the charter.”

But there are these specific kinds of rights which depend very much on the evolution of

public morality over a period of time, public values and the values of Canadians, and the courts are going to have that input.

Now I say, here with the distinct society we have moved light years beyond that because we have said, essentially, that a provincial jurisdiction will have rights and authorities which are undefined, which the courts will give it but by virtue of this provision.

Again, of course, it is indeed a matter of degree: where do the legislators stop exercising their authority and where do they start? I think, as I think Mr. Breaugh put it earlier, that legislators should put it in the language to say what they really feel this means. Of course, the debates in the legislatures will help the court to interpret what we mean.

Can you imagine Sir John A. Macdonald, if he had been asked, “What does peace, order and good government mean?” Do you think he would have said, “I haven’t the faintest idea, but some day the judicial committee of the Privy Council will tell us.” I do not think so. I go back and look at those Confederation debates and the whole thrust of what they were trying to do, it seems to me, is quite apparent. But we have a “distinct society” clause and that is exactly, not perhaps in those specific words but damned close, to what our people are saying, the people who emerged from that meeting, “We do not know what distinct society means; some day the court will tell us.” The implications of it are vast because they actually can create an unbalanced federation and that is what I regard as totally unacceptable.

### 1730

**Mr. Offer:** Just as a supplementary, when you talk about the implications being vast, surely on the whole question of distinct society it could be argued that in dealing with that as an interpretive tool that it is truly to be used in dealing with the particular issue at hand. I do not think there would be an argument in that respect, keeping in mind that there are certain rights and freedoms in the charter. I know that brings in another question, but in dealing with the distinct society and in dealing with your particular presentation today, certainly when one takes a look at a vast leap ahead, it could very well be argued that there are right now protections within the charter available to those. To ask for a definition of distinct society in the absence of a particular fact situation is not to give any greater certainty than we have right now, because the fact situations will always change.

**Hon. Mr. Johnston:** Let me counter your question, because you are talking in terms of the

charter; let me ask you this question. Do you think that the Supreme Court of Canada faced with, say the application of the peace, order and good government clause for a national basis—those of you who have studied constitutional law probably recognize that there were really two schools as to the application of that. One was the so-called “emergency doctrine test,” to which it was limited for many years, which meant in the case of war or famine I think were the examples given by Lord Watson, the federal government could use the peace, order and good government clause. Then there was the “national dimensions test,” so-called, which is where the matter is of national concern, such as temperance, that you could use the peace, order and good government clause.

Now you have the peace, order and good government clause which is subject to interpretation, in the case of Quebec as a distinct society, and with a rule to promote its distinct identity. If, for example, you again had an AIB—you will remember the Anti-Inflation Board appeal which went to the Supreme Court—do you not think that the Supreme Court might be inclined—because this is not limited, as Mr. Bourassa pointed out, to language issues—to apply it differently in the case of Quebec than in the case of Ontario?

If you could satisfy me that there would be no different application to Quebec or to Ontario on that or any other factual situation with respect to powers, then I would be a lot more comfortable. Mr. Lederman gives me a great deal of comfort—well, he does not give me a great deal of comfort, because I think he is wrong; if I thought he were right, he would give me a great deal of comfort. Quebec does not think that. Quebec thinks probably that the “peace, order and good government” clause should be reduced in terms of its application to Quebec to, say national emergencies. That national dimension test might apply with respect to the application of that clause elsewhere in Canada. I think that is a reasonable position for Quebec to take, and I do not think that is where the federation should operate. You may not agree with that.

**Mr. Offer:** In response, whether one agrees or disagrees, I guess the nub of the issue is that even if that question were able to be answered definitively to you and to your satisfaction, you might, on some secondary thought think, “Ah, but what about in this fact situation?” My point to you is that if that is the certainty that you are looking for, then in all practicality, in all reality, and in dealing with the historical evolution of

court cases themselves, there is not that type of security, using your example.

**Hon. Mr. Johnston:** Yes, but why should we add to that lack of security by creating two societies, one distinct? “Distinct” means separate, by one definition of it, certainly in French if not in English. Why should we incorporate such a concept in our Constitution and attach legal consequences to it? Because you are right; it does create all these uncertainties.

**Mr. Offer:** What you are now saying is that if we cannot have the certainty with respect to distinct society, then we should not have the “distinct society” clause in the agreement itself.

**Hon. Mr. Johnston:** I do not think the “distinct society” clause should be in the agreement.

**Mr. Offer:** I was just questioning, because in your particular submission today it very well revolved around distinct society, but in the last three of four lines you say that we should take some reference before the courts. That is something much different to saying that we should not have anything to take as a reference.

**Hon. Mr. Johnston:** My assumption is that once you get it before the court you also will agree with me that the “distinct society” clause should not be in the Constitution, because I think the court will say that the “distinct society” clause could override the charter in certain circumstances, that it could create additional powers for Quebec as a distinct society and that the right to promote it also involves international representation. In other words, a form of sovereignty-association could emerge from its application.

If the court were to say that, then I think Canadians would agree that the “distinct society” clause should not be in the Constitution in that form. It might be preambulatory as we had it in November 1986, citing the distinctive character of Quebec as the principal, but not the exclusive, source of French language or culture.

My whole purpose of getting it before the court, hopefully, is for the court to scare the hell out of everybody by making them recognize that they are embarking on a slippery slope with the “distinct society” clause.

**Mr. Chairman:** I will accept one brief supplementary, after which we will allow Mr. Johnston to relax.

**Mr. Allen:** Forgive us for prolonging this, but you are not here every day and you have come from a distance. Let me try something out on you with regard to individual rights, group rights, the



Constitution and section 15 of the charter. You are aware that section 15 has two parts. The first part affirms all the individual rights. The second one says this "does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Obviously, what it has in mind is that there may be some apparent differential in program and legislation in order to enhance affirmative action for a disadvantaged group. In view of the fact that Quebec has existed as a province that houses the one really substantial and different minority that functions in a language daily and therefore has special problems in the context of North American language and culture, what essentially is the difference between the recognition in the Constitution of that distinct society and some additional powers for Quebec that might conceivably flow through that? They will obviously be adjudicated from time to time in the courts and have to exist in tension with federal and other provincial initiatives. What is the difference between that and what the second subsection of the equality rights statement of section 15 says?

**Hon. Mr. Johnston:** As I mentioned earlier, Quebec has full authority over language now, with the exception of section 133 and section 23. Section 23 is limited in Quebec to the so-called "Canada clause," which permits people who come into the province whose parents were educated in English to be educated in English, for example. I think, and some of the constitutional authorities like M. Beaudoin would say, in Quebec we have everything we need on language.

If they are struck down, for example, on signage in the bill before the Supreme Court of Canada, they might say they need more in that regard and they probably would rely upon the "distinct society" clause, although, as you know, they also have the "notwithstanding" clause, which they have suggested they might apply. I am beginning to sound as if I am representing a particular disenfranchised group. That is not my intent here today. I want to point out the problem of the distinct society and the anglophone minority.

The fact of the matter is that I do not believe that the promotion of the French language in Quebec requires the suppression of any minority rights in Quebec. I think it could very well

involve affirmative action of the kind you talked about. For example, it could involve a law which says that you have to have French on a commercial sign but you can have another language as well. In fact, there is an article by M. Dussault, who was a councillor for the language office in Quebec, in *La Presse* in December. He said he could only find fascist states that had ever had a law which said you cannot by law, on pain of penalty in prison, put up a sign in your own language.

That is basically what the intent of the current situation in Quebec is. I do not accept that. I have no problem, and I do not think the English community has any problem, in promoting French in every other which way. I think that is entirely compatible with the notion of section 15, but those powers are already there.

**Mr. Chairman:** We want to thank you very much for coming and spending a good deal of time with us. We have had a number of phrases that from time to time have come up in our hearings. Mr. Breagh brought to our attention a few weeks ago the "hallucinatory nature" of constitution-making, and you have added, I think, a unique one in terms of the "one-way ratchet." Perhaps at the end of all of our hearings we will be able to have a dictionary of terms.

I want to thank you very much not only for the oral presentation you made, but also the annex and, particularly, for engaging in what was a very free-flowing and frank discussion. I think at this stage in our hearings we are really into and need that kind of exchange. It was extremely helpful and we appreciate your coming very much.

**Hon. Mr. Johnston:** Thank you. May I ask you a question before I leave?

**Mr. Chairman:** Yes, please.

**Hon. Mr. Johnston:** Do you intend, or has there been any thought of, inviting any official spokespersons from Quebec before your committee?

**Mr. Chairman:** We have been discussing a number of things in terms of people we would like to have appear before us. One of our dilemmas as a committee of the Ontario Legislature is to what extent people's expectations are that we should be doing a cross-country tour, as it were. There are those who have commented that they feel we should not do too much with representatives of Quebec unless we were going everywhere else. I think we are mindful that is a very important area for us to receive views, but we have wanted to be somewhat careful in how

we handle it so as not to create expectations that we really can go everywhere.

**Hon. Mr. Johnston:** I can understand that, but I have been rather anxious, not to try to shoot things down, but simply to make decisions clear. I think M. Rémillard would be a very important witness who might come voluntarily before the committee to say: "You have heard Johnston say what we think about the 'distinct society.' We will tell you." These deliberations, as you know, can play a very important role in the interpretation of Meech Lake, should it go ahead in its present form, which is what I fear.

Unfortunately, at the present time we have views being expressed in Quebec City, as Lise Bissonnette pointed out, other views being expressed in Ottawa and other views being expressed here. I think it would be very helpful if

you could have the Minister responsible for Canadian Intergovernmental Affairs, who is one of the chief architects of this, come before you.

**Mr. Chairman:** I think that is a suggestion we will look at.

**Hon. Mr. Johnston:** Far be it from me to set your agenda, which I know is very heavy, but I have been hoping that at some public forum that would take place. It has not happened yet.

**Mr. Chairman:** We still have quite a bit of time before we make our report, so we will take that under advisement.

**Hon. Mr. Johnston:** Thank you very much.

**Mr. Chairman:** Thank you very much. We will return here tomorrow morning at 10 o'clock.

The committee adjourned at 5:43 p.m.

## ERRATUM

No.	Page	Column	Line	Should read:
C-9	C-440	2	17	and some 56 per cent of women with children under the age of three work. Yet most of the



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## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

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 Fawcett, Joan M. (Northumberland L)  
 Harris, Michael D. (Nipissing PC)  
 Morin, Gilles E. (Carleton East L)  
 Offer, Steven (Mississauga North L)

**Substitution:**

Lupusella, Tony (Dovercourt L) for Mr. Morin

**Clerk:** Deller, Deborah

**Staff:**

Bedford, David, Research Officer, Legislative Research Service  
 Madisso, Merike, Research Officer, Legislative Research Service

**Witnesses:**

**From the Women's Intercultural Network:**

Adolph, Rheba  
 Shariff, Firoz

**From the Nishnawbe-Aski Nation:**

Louttit, Lindbergh, Deputy Grand Chief; Chief, Abitibi Reserve  
 Cachagee, Bill, Chairperson, Wabun Tribal Councils  
 Mosquito, Rosie, Chief, Bearskin Lake Band  
 Imai, Shin, Legal Counsel; with Iler, Campbell and Associates

**Individual Presentation:**

Johnston, Hon. Donald J., MP for Saint-Henri-Westmount









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# Hansard

## Official Report of Debates

### Legislative Assembly of Ontario

#### **Select Committee on Constitutional Reform**

1987 Constitutional Accord

#### **First Session, 34th Parliament**

Tuesday, March 8, 1988

Speaker: Honourable Hugh A. Edighoffer

Clerk of the House: Claude L. DesRosiers



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Contents of the proceedings reported in this issue of Hansard appears at the back, together with a list of the members of the committee and other members and witnesses taking part.

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

**Tuesday, March 8, 1988**

The committee met at 10:08 a.m. in committee room 1.

### 1987 CONSTITUTIONAL ACCORD (continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin today's session, I invite Ian Orenstein to come forward. Welcome to the committee, Mr. Orenstein. We are happy to have you with us. As far as our procedure goes, if you would like to present your submission, then we will have time for any questions that might arise out of your presentation.

#### IAN ORENSTEIN

**Mr. Orenstein:** I should say that I am a freelance broadcaster at CIUT and formerly of CKLN. I am also a full-time student in radio and television.

**Mr. Chairman:** CIUT is the University of Toronto radio station?

**Mr. Orenstein:** That is right.

**Mr. Chairman:** I have listened to it.

**Mr. Orenstein:** The title of my document is New Jerusalem, Yes! Meech Lake, No!

Quebec did not sign the 1982 constitutional change. That is why some people are supporting the Meech Lake accord with all its flaws, but the Supreme Court of Canada has ruled Quebec a full participant in the Constitution since 1982.

I have asked myself, can there remain any reason for people who want more democracy and power for the working class to still support Meech Lake? No. If you want working people and their families to get more rights and be able to participate in national programs, you have no business supporting the present proposed constitutional changes.

Never did I know you would stoop so low as to support a document that will make it impossible for a New Democratic Party government in Ottawa to implement party policy.

My friends, I want to put forward to you three main flaws with the Meech Lake pact. The first is that it takes away federal spending powers in the area of social policy. When the New Democratic Party of Canada forms a national government, it will have provincial governments opting out of national programs. The federal government

would have to reward those provinces for sabotaging the national plan.

Former Prime Minister Trudeau called it a patchwork quilt for Canada. On The Journal last May he asked Barbara Frum, "Do you know why PEI can't afford a universal day care program?" Barbara Frum answered, "Because they have too small a population." There can be no national programs if large provinces pull out of programs and are given money for doing so. The remaining provinces could not sponsor the programs.

The improved Meech Lake document still leaves crucial decisions in the hands of the courts, says Saskatchewan NDP leader Roy Romanow. Mr. Romanow says the clause on federal spending power is still "very loose."

New Democrat MP Ian Waddell, who voted against Meech Lake, says Mulroney gave half the country to the provinces and the remainder to the United States with free trade. Mr. Waddell is consistent. He also voted against the 1982 enactment of the so-called bill of rights. If anything, it is mostly a bill for the right wing.

Almost every case brought before the courts on the bill has come down against workers and for the right wing. The National Citizens' Coalition won against trade unions' rights to collect union dues for political activities. The former program of collecting union dues is called the Rand formula. The courts have changed it to the Ayn Rand formula. Another former right of workers declared unconstitutional was the right to strike. We do not need more anti-working-class constitutional changes like the Meech Lake amendments. We need more power for the people.

The second flaw with Meech Lake is that it is part of the Americanization of Canada. As I have already mentioned, free trade is Mulroney's way of handing Canada over to the US. Meech Lake is part of that plan. Let me quote from a document: "The Senate of the United States shall be composed of two senators from each state chosen by the Legislature thereof...." Sound familiar? That is from the US Constitution of 200 years ago, article 1, section 3.

Let me quote from Meech Lake: "...appointments to the Senate come into force, any person summoned to fill a vacancy in the Senate shall be chosen from among persons whose names have



been submitted by" the governments of the provinces. I guess Mulroney loves the US so much that he requested some statements from the American Constitution be included in Meech Lake. The problem was he got the original Constitution of 1787.

Eventually all our senators could be picked by the provinces and we could have the situation of the American Constitution of 1787, which stated, "He"—the President—"shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court...."

If we pass the Meech Lake amendments, we will have the provinces using the Senate as a proxy to keep control of the federal government, as in the US. The US did not have a Constitution to have direct elections to the Senate until 1913. Do we have to wait 130 years before the provinces no longer have the job of puppet masters?

Meech Lake gives more power to the provinces but nothing new to the federal government. The late Prime Minister Lester Pearson said, "Ontario and Quebec...were as much creatures of Confederation as the federal government." The western provinces were "the creation of the federal government—not the reverse."

Will judicial supremacy lead to abominations such as the Dred Scott decision of 1857 in the United States? Seventy years after the framing of the Constitution, the majority of the US Supreme Court opinion maintained, "The right of property in a slave is distinctly and expressly affirmed in the Constitution." Are we not already seeing this in Canada with our court system's denial of the right to strike?

The third flaw with Meech Lake is that the process is undemocratic. Mulroney says that even if there are flaws in the document, we cannot change it. As Pearson pointed out, the provinces were created by the national government, so why should the provinces have a say when and if the Yukon or the Northwest Territories can become provinces?

In 1982, the debate on the Constitution allowed people to get changes, like the inclusion of women's and natives' rights, which former Saskatchewan NDP Premier Allan Blakeney demanded be added to the Constitution after the people demanded it.

Over the weekend, the Manitoba NDP passed a motion that called on the Manitoba NDP government "to take steps to deal with the flaws in the accord" prior to having the Legislature make decisions on the accord. The government of Ontario can learn from Manitoba and do the same.

Unanimous support of any future constitutional changes, if Meech Lake is passed, is also undemocratic. Every constitutional conference since 1927 has not been unanimous. The only reason there was unanimous support for Meech Lake is because Mulroney, to be nice, gave over federal powers to the provinces without representing the national government's interests. It was left to Ontario and Manitoba to push for stronger federal spending powers. Unanimous support for future changes closes the door on democracy.

Instead of Meech Lake, let us open the door, as Tommy Douglas used to say, to a new Jerusalem. Let the people of Canada into the constitutional process. If they want a strong federal government, put that back in the Constitution. Let us make the changes that put the working people first.

Another former NDP Premier of Saskatchewan and former national leader of the New Democratic Party, Tommy Douglas, said: "As long as we maintain an economic society founded on greed and selfishness and on brute force, just so long can we expect to have class warfare within the nation and civil war on a world scale between nations. The only hope is that we shall try to build a new kind of society...the only hope lies in a society based on co-operative living." Those are the kinds of constitutional changes we need.

Pauline Jewett, in an interview last week, said now that she is leaving the House of Commons, the only time she wants to be a member of the Senate is as part of a demolition team. With this unanimous clause of the Constitution, another NDP policy, to abolish the Senate, will be made unconstitutional. We do not need it handed over to the provinces or elected. Just give NDP MP Pauline Jewett her wish and abolish the Senate.

Instead of power struggles between the two higher bodies of government, there is a greater need to give municipalities at least some recognition in the Constitution. Work towards restored union rights. The right to breathe clean air should be in the Constitution. Animals and children need rights in the Constitution. Public ownership should be stronger and defined in the

Constitution. We need more democracy, not unanimous votes of the powerful.

Tommy Douglas used to quote a line from Tennyson. I have just changed it a little: Courage, my friends, 'tis not too late to make a better world. Thank you.

**Mr. Chairman:** Thank you very much for your presentation. You have also introduced a number of ideas that we have not had raised before, particularly at the end, in terms of municipalities and some of the other areas, and more specifically, the question of union rights and strike rights and that sort of thing.

**Mr. Allen:** I thank Mr. Orenstein for bringing forward his brief this morning. I notice that today we have a fairly heavy representation of individual, private-citizen presentations. I think it is extremely important that we listen to as many of those individual presentations as possible and see where people are coming from with regard to Meech Lake.

I gather, both from the title and the contents, that Mr. Orenstein's *New Jerusalem*, Yes! relates to his comments at the bottom of page 4, where he is interested in a society that is based on more co-operative principles. That being the case, I wonder if you could share with us your views as to what kind of redistribution of powers in the Canadian Constitution that might imply.

You seem to have running through it, although you do not say it quite explicitly, some partiality for a very centralized federation with the federal government exercising national powers in order to establish national programs, and yet, of course, in fact we do have provinces and they do have jurisdictions. Every time the federal government moves these days on what would appear to be the priority issues of the day—social issues, for example, and social programs—it begins to tread on provincial ground.

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One of the major problems in the rebalancing of Confederation, as you probably know, has been that whole issue of the emergence of social programs to the fore on our national agenda in the course of this century, in the course of which the provinces became bigger and bigger players, but with limited resources because of the way in which the tax jurisdictions have been set up.

In order to achieve your goal, how would you go about redefining those jurisdictions so that one had municipal, provincial and federal governments working together, and at the same time, no one part of the federation dominating the others? I am not sure I see that coming through clearly in your statement.

**Mr. Orenstein:** First, if I understand it, a lot of social policies are constitutionally in the charge of the provinces because when they first came out with them, they said they were unimportant. They said, "We will not give it to the federal government; we will give it to the provincial governments."

Since then the federal government has said, "Now that we have built the railways, we have to get into social programs." I believe that because there are poorer provinces, the federal government has to have the right to participate. Just because of that mistake when they formed the British North America Act is no reason we should continue that. When it comes to co-operation, what the provinces used to complain about, the situation they had with the federal government of their being like children and being told what to do by Ottawa, is what it is really like for all the municipalities.

The provinces can take away municipal regional governments, or give them, without anybody taking them to court because there is only one sentence, I think, in the Constitution for municipalities. It says that they are the children, or something like that, or the responsibility, of the provincial governments which can do whatever they want.

The way in which I see regional, municipal and federal governments working together is that the federal government would have a planning policy that, when it comes to any one policy where there is a constitutional conflict with the other governments, they would work it out. There would be a guarantee that poorer provinces could have programs. If richer provinces wanted to opt out, they could opt out but they could not get the money, because the federal government raised those taxes and should not be giving back money to provinces that somehow decide that either they are going to do a better program or something totally different, but that say they are going to do something. Meech Lake does not say who is going to decide what is the equivalent program, and they could say, in the case of day care, "This is going to help day care and not be exactly the same program."

Tommy Douglas, when he was talking about it, was more and more wanting people to participate in politics. I think if we somehow got municipalities, which is the closest government to the people, into the Constitution, then maybe the others would start being more like municipalities. For example, a town hall meeting is not as structured as a parliament. In a parliament you are allowed to watch your representatives, but in



town hall meetings, the people who show up talk to their representatives while they are in the room. I think we should somehow have—not go to referendums, but our representatives should hear more of what their constituents want, such as more power.

**Mr. Allen:** Would it really be a co-operative federal state if the federal government were able simply to say to the provinces, "This is what you have to do, period, to get the money," or is it a more co-operative federal state where the formula is fairly flexible and both rich and poor provinces can lay down their own terms in the course of negotiations for the receipt of dollars? I am mindful that it is not just rich provinces that opt out of programs; it is also poor ones. The problems we have had fielding a national day care program lately have been more the difficulty of poorer provinces coming up with the dollars to fund what, after all, would be a very expensive undertaking. The rich ones can always somehow make a go of it with one program or another or one set of objectives or standards or another.

My sense is that while one might not like all the nuances in the Meech Lake spending-powers shared-cost-program section, is there not a fairly flexible formula that allows for the kind of co-operative give and take that is going to be necessary in establishing programs that are (a) national and (b) have some degree of compatibility for local circumstances and situations?

**Mr. Orenstein:** In the case of Quebec and Ontario, for pension plans and medicare they said they were going to establish their own programs, and they fought over that. But I do not think they got federal money to fund those things; I think they decided to be separate.

I think part of it is that the federal government should have the right to keep that money if provinces opt out, rich or poor, if it was legally collected under federal taxes. If they were provincial taxes, I can see giving them back because it was the provincial government that collected them. But any taxes collected by the federal government should remain with the federal government.

**Mr. Offer:** Your first concern is really a carry-on of the discussion you just had with Dr. Allen with respect to the federal spending powers and taking away federal power in certain areas. As you know, the particular provision in the accord talks about areas within exclusive provincial jurisdiction only. Using your argument and your concern, does this not really support what you are saying by taking that next step, by saying, "Now we have it clearly in the Constitu-

tion that the federal government does have the right to expend money in a cost-sharing program in areas of exclusive provincial jurisdiction"? As such, where it was not in the Constitution before, it is now in the Constitution.

Indeed, far from taking away federal powers, it could very well be argued that it strengthens the federal powers on one hand, yet, on the other, allows particular provinces to opt out—that is correct—in these circumstances as long as they meet with the particular national objectives. So we have a flexibility on one hand, yet on the other hand we have a clear indication that now the federal government does have the right through the Constitution to spend in areas of exclusive provincial jurisdiction.

I am wondering what your thought is in those terms, that this particular agreement does, in fact, give the federal government a power which it did not have before.

**Mr. Orenstein:** Well, in the case of legalisms and constitutions, I have been studying that a written rule can be more inflexible than flexible. British law has a lot of things unwritten in it and American law has them written, so the Supreme Court ends up with more power and the legislators less. Before they would negotiate between governments, but it is now going to be in the hands of the courts on that part of the document. Then, when it comes to powers to people not representing the government, they have to have their powers defined, because they cannot defend themselves.

But governments in the past would decide what they were going to do on social policies and whether that would be federal or provincial. Sometimes provincial governments wanted to take over things that were written for the federal government, as in the case of broadcasting. A lot of provincial governments say it is a provincial constitutional right; the federal government says it is federal and the federal government negotiates it.

With this new change, wherever it is provincial law that they do the raising and the spending on social policies, the federal government can now do programs whether the provincial governments want to participate or not. It may be more flexible in that it is now recognized, but I think, because of the way it is written, the federal government is now taking a back seat instead of, as in the past, negotiating by saying, "This is a program that our party got elected to do." It is almost like saying, not just of the New Democratic Party but of other parties that have national policies in their program, that they are unconsti-

tutional and we cannot do it because of that one resolution or amendment in Meech Lake."

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**Mr. Offer:** OK, thank you.

**Miss Roberts:** My question is with respect to process. You have indicated that the process was flawed, but you have also indicated that there are many things in the charter and the Constitution as it now stands that you would like to see changed.

Just forget about Meech Lake for a while; forget about its existence. You have many changes that you would like to see. How are you going to get those changes? What is the process?

**Mr. Orenstein:** If Meech Lake gets passed, it will have to have the unanimous consent of 11 governments.

**Miss Roberts:** I ask you just to forget about Meech Lake, OK? How are you going to get the right to strike into the charter? Do you do it by going through the provincial government, having a resolution? Have you thought about the process?

**Mr. Orenstein:** Before we get down to exactly what I would want, I would want more people to be able to participate. Hearings like this are nice, but what I say or whatever someone else says is not going to be written down and they are not going to say: "Oh, that is a good idea. We'll put that in."

You can suggest at the end, "There are flaws and maybe you should change it." But if we had a big discussion between elected people and nonelected people getting together and saying, "This is what we want," then they brought that forward to the general population and then got that included in a Constitution, we would have a more democratic process than having a document brought together by our elected representatives and then saying: "Do you like it or not? We are going to enact this unless you see some major flaw."

You are asking people what they think of a fait accompli, and I think we should have people able to discuss it all across the country, maybe for a whole year. They would have meetings all over the country and tell their representatives, and also have official meetings, not just nice suggestions.

**Miss Roberts:** So you are suggesting, if I might just put it in more structured terms, a federal commission of some type that would go across the country for a year trying to set up some changes or some thoughts on the Constitution, and it would report. Is that what you are suggesting?

**Mr. Orenstein:** That is legally what we have now, but I was thinking of something more expanded on that. In the case of municipalities—I think in Ottawa—they can have community associations that can participate in that. If you want to structure your streets—which ones are going to be one-way, where they are going to put blocks in so they will not have through traffic and so on—they listen to it and end up saying, "OK, that is what the people who live there want," and that is what they give them.

We should have something like that in Canada. In Quebec they do want special status and we find out what they mean by special status, not just the Quebec government. We find out if Quebec wants more than just that, but within Confederation, of course.

**Miss Roberts:** OK.

**Mr. Chairman:** I want to thank you very much for coming in this morning and for presenting your brief. Thank you as well for answering the questions that the committee has put.

**Mr. Orenstein:** Thank you.

**Mr. Chairman:** I then call upon our next witness, Linda Silver Dranoff, to come to the chair.

**Ms. Silver Dranoff:** Good morning.

**Mr. Chairman:** Good morning. Welcome to the committee. We have two documents which you have provided: the presentation as well as the article that appeared in the *Globe and Mail* last September.

**Ms. Silver Dranoff:** That is right.

**Mr. Chairman:** Everyone will shortly have that. I am going to ask you simply to make your presentation. We will follow that up with a period of questions and, we hope, cover all the points that you want to raise this morning with us.

LINDA SILVER DRANOFF

**Ms. Silver Dranoff:** Thank you. While I am here as a private citizen, I am associated with the Canadian Coalition on the Constitution and a coalition of women's organizations which are fighting against the Constitution. But I feel very strongly that private citizens should speak out on this issue because it affects the future of Canada so much, and I speak as much more than a member of any particular group.

I am very proud to be a citizen of Canada and I feel that it is the national future that we are talking about when we deal with the issue of Meech Lake. I am concerned that the public



interest of Canada as an entity has been underrepresented in the negotiations of those who were dealing with and arrived at the Meech Lake accord.

While I am here as a private citizen, I think it is always useful to understand a person's background and where her perceptions come from. You could define me as a woman and dismiss me as representing women's interests only, but I hope you will not do that. I am also a practising lawyer, which helps me to understand what happens when legislation comes to be interpreted in the courts.

I am Canadian-born-and-educated, with an honours degree in history from the University of Toronto and an LLB from Osgoode Hall Law School, and throughout a student of politics. My grandparents were immigrants to this country, and I remain grateful, two generations later, for the opportunities I have had in Canada. If you want to know still more about why I feel compelled to speak out, understand that I am a mother who wants her daughter to live in the best possible Canada.

I do speak with a heavy heart for the public interest and against the accord with everything I know from this background and can envision. I feel that I speak for myself, but also for others who feel disenfranchised and ignored by the constitutional changes which are threatened. This is why I oppose the accord, in a summary fashion. You have heard many details, I am sure, throughout your hearings.

As I see it, it drastically changes our constitutional structure in a way which decentralizes our country, threatens national social programs, creates disharmony in our nation, undermines the Charter of Rights, and shifts the balance of powers to the provinces from the federal government and from governments to what I see as an oligarchy of first ministers. It satisfies Quebec but creates disaffection among women, ethnic groups, native peoples, aboriginals, the territories and those who expect to benefit from the charter, who are many, many in our society. And it was, as I see it, created undemocratically.

The accord is not a simple matter of the recognition of Quebec as a distinct society. That is not all that Quebec asked for and got. Quebec's Minister responsible for Canadian Intergovernmental Affairs set out a list of five things which Quebec wanted. Those five were granted in the Meech Lake accord, but that is not all that was done. Not only did Quebec get every single one of its requirements met, but every other province

also got what Quebec asked for as the price of making the concession to Quebec.

My concern is that I do not think there was a really adequate feasibility study done of what the impact would be of giving to everyone else what Quebec wanted. I think those who met and agreed to the accord may have thought that list of five would be satisfactory to give Quebec, but I do not believe that any consideration was given to the impact on the country as a whole of giving the same five to all the other provinces.

In the process of the negotiations, the people we elected to govern this country—and by that I mean not only the national government but also the provincial governments, which I feel have an interest and a stake in our national future and not just in the provincial future—these people to whom we entrusted our community have diluted national powers to such an extent that we are in danger of voluntarily paralysing ourselves as a nation.

We have to remember that Canada is not the country it was in 1867, when we were basically English and French and the Constitution at that time was intended to protect that particular mix to continue. It is not the same ethnic mix today, and no amount of constitution-making can make it what it is not.

For example, in 1867 women were not important in the constitutional scheme of things. We did not even exist, in fact. Until 1929, when we were defined as persons, we were not considered a part of the Constitution at all. Women did not get a fair shake under the 1960 Bill of Rights, but in 1982 we got guarantees of equality rights in the charter.

Now those guarantees have been eroded, because the words protecting Quebec as a distinct society will take precedence in any judicial interpretation of the charter. So women have lost out in this current round of constitution-making if the accord is ratified. I say "if" very definitely because I am certainly very hopeful that what happens in Ontario will have an impact on stopping it from being ratified.

The other thing different now from 1867 is that we did not have a charter then. It almost did not come into being at all in 1982, and it is clear that the provincial premiers did not want the charter in 1982, nor did Quebec want it. It was only when agreement was reached that the provinces could opt out of the charter by invoking the section 33 "notwithstanding" clause that the charter was permitted by all provinces but Quebec to see the light of day. Since 1982,

Quebec has taken full advantage of the "notwithstanding" clause.

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The charter has been eroded by the "distinct society" clause, which will take precedence, but also by the other constitutional changes. This is because all the changes except the multicultural saving clause were amended by changing the 1867 and 1982 constitutions, and the recent separate school funding case held that these constitution acts take priority over the charter.

We should not forget that the charter is a very important document which guarantees fundamental freedoms; legal rights; democratic rights like the right to vote and the requirement of elections every five years; mobility rights, and equality of status, rights and privileges for both English and French as official languages in Canada. It guarantees equality rights for women and for everyone: the right to challenge laws if the laws themselves or the procedures by which they are applied do not protect women the same as they protect men, or protect the old as they protect the young, or protect the disabled as they protect the able-bodied or those whose race and colour are different from the majority.

There is no doubt that the accord is a complicated document with wide-ranging implications, but then how could anyone accept the simplistic statements of pro-accorders that it is only to get Quebec into the Constitution? How can we respond complacently to cajolings to trust the people who signed the agreement, that they did not intend to hurt the country and so therefore the accord will not hurt the country? These, in my view, are meaningless reassurances and unresponsive to the concerns of vast numbers in our society who are concerned about the impact of the accord.

My concern as well is that the first ministers, in their responses since the accord was originally signed, behave as though they took an oath of allegiance to each other to force the accord through and, in the process, they may have forgotten their oath of allegiance to Canada.

Those who favour the accord, even those who feel that it should be passed, gloss over the concerns of the rest of us about the non-Quebec terms of the accord. They feel that since Quebec has been made happy by the accord, then it is acceptable. My concern is that they will have created problems of constitutional interpretation which will plague the country for years to come.

Even the joint parliamentary committee, the federal one, said that the precise impact of the "distinct society" clause cannot be determined in

advance and will be felt at the margins of government authority. Now, I do not know what the expression "the margins of government authority" means and I do not know how that is going to affect us. My concern is that leaving the accord loose is like leaving a loose cannon on a rolling ship. Note that everybody hopes it is going to end up in a safe harbour, but the chances are it will not, because we are not making sure of it.

This is not 1867 any more in other respects. The spending powers of the federal government are very important. In 1867 we were not paying taxes; I am sure there are many of us who would like that 1867 still to be here in that respect. But now the federal government takes taxes and distributes taxes and, in the process, makes policy. Until the accord, federal spending powers were in the political arena and money-sharing between the provinces and the federal government was a political issue. Now it is likely to get bogged down in judicial interpretation over the meaning of new terms like "national objectives" or "initiative." What before were requests from the provinces will become demands as of right. What will it mean to constitutionalize the spending-powers provision?

Whether it weakens the federal government or strengthens it, as some say, it is clear that there is even a dispute about that. But what is sure is that the federal government's political leverage will be damaged. The problem is that when you constitutionalize things you leave the decisions then to judges rather than to legislators. We are not like the United States, in that our judges are not elected, they are appointed. According to the new Meech Lake accord system, they will be appointed to a much greater extent by the provinces than by the federal government, so you are changing the way in which decisions are made that will affect our country and you are undemocratizing it if you are leaving it to appointees to make decisions which are crucial.

My concern as well is by that by constitutionalizing the spending-powers provisions together with the decentralization of our national decision-making process, we may have a weakening of our national ability to meet the challenges of environmental protection needs, telecommunications, science and technology, social assistance needs, those that need to be done by national will. The changes in spending powers, together with a threat to the charter, may affect old age pensioners' rights too. Who knows?



The point really is that we do not know. There are too many unanswered questions and those who signed the accord are turning too blind an eye to public concerns. The federal government gave us a debating society in its public hearings. I hope these hearings will be different and will be more than an opportunity to ventilate concerns.

I am concerned that the Premier (Mr. Peterson) is widely quoted as saying that he will expect his caucus to back the accord. I am concerned because I think there are dangerous consequences in ignoring the accord's faults and simply going along with an agreement signed by a group of first ministers. I suggest as well that we will have vast new grievances in this country which will create much more disaffection than we have seen from Quebec: by women, disabled groups, the multicultural and aboriginal communities, the territories and others.

I believe the entire accord should be sent back to the conference table first, at which all interested parties should sit, and also to the drafting table to ensure that the language is effective to dictate the desired results. I encourage this committee to recommend that course of action. If the language is not effective to achieve the results that those who signed it want to achieve, then we absolutely do not know what is going to happen and what the interpretation is going to be in the courts.

It is my wish—and perhaps wishful thinking, but I hope not—that the Ontario government would allow a free vote, as a matter of conscience, when the ratification vote takes place in the Ontario Legislature. At a minimum, if everyone is determined to see this thing through, at least refer it to the Supreme Court of Canada in an effort to clarify the meaning before the difficult cases that have to be dealt with arise. If the Premier of Ontario invokes party discipline to ratify, I would encourage what I would regard as noble and patriotic dissent by MPPs in voting against party lines in the best democratic tradition.

The future of our nation as a nation is at risk and I feel it is the responsibility of every citizen to speak out. We must do more than vote at election time or our representatives may forget who gives them their power. We must stand on guard for our country when we see that our leaders and the opposition parties are not and we must speak for Canada when elected politicians do not.

In a democracy, we do not give our leaders *carte blanche* to change the most basic rules. If we let the first ministers amend the Constitution so drastically without our consent, will they then

decide that elections need not take place every five years, but instead, every 10, 15 or 20? I know that sounds far-fetched, but the Constitution, in a very basic form, is being changed and we cannot simply rely on trust that our leaders will take care of us.

The future of Canada and its status as a true democracy was placed in the care of our elected representatives, federal and provincial. I feel that if the Meech Lake accord is ratified, we will know that sacred trust was misplaced. Thank you.

**Mr. Chairman:** Thank you very much. I noted your comments at the beginning about the various hats we all wear; we are all private citizens and we are also many other things, and I do not think that takes away from the importance of doing what you have done, which is to sit down and prepare a very thoughtful presentation, one that clearly expresses as well a lot of feeling with it, so we thank you for that and also for the other hats you wear.

**1050**

**Mr. Eves:** I want to thank you for your presentation this morning. You have made a few points that agree with my thinking so I naturally think they are very good.

However, I do want to get to what your bottom line is. I gather you would prefer it if the Legislature and this committee had a free vote. I note that you say you have several concerns. One is the charter and whether or not the wording of the Meech Lake accord, or particular sections thereof, for example section 16, is going to overrule certain rights in the charter. I think, fairly put, that is ambiguous at best. We have had constitutional experts and legal experts appear before this committee and come down on both sides of that issue. I think the natural reaction to that is a Supreme Court reference. It has been suggested to us. Professor Baines, I believe, was the first one and other members of the committee have followed up on it.

I take it that is your bottom line. If the committee refuses to look at specific changes to specific sections in the accord and the various parties decide for whatever reason that they are not going to permit a free vote in the Legislature or in committee, the very least you would like to see is a reference to the Supreme Court. Is that true?

**Ms. Silver Dranoff:** Yes, I think that really would be the minimum. I suppose my underlying thinking behind that is that I would expect that if the Supreme Court of Canada, with nine judges, hears a reference as to what the Meech Lake

accord means, you are going to get a five-four split on most questions. That is really going to show us what you are hearing in this committee, which is, if there is no agreement as to what it means, then the judges are not going to agree either and then where are we at?

**Mr. Eves:** I think Ontario has the ability to refer this to the Court of Appeal, a branch of the Supreme Court of Ontario, but I do not believe it has the authority to refer it per se to the Supreme Court of Canada.

**Ms. Silver Dranoff:** The Court of Appeal is fine too. The three judges will go two to one then.

**Mr. Eves:** At least that would be a step in the right direction, I gather, from your point of view.

**Ms. Silver Dranoff:** That is right.

**Mr. Eves:** However, I gather that your concern about the accord is much more basic than this, and that this is, as you say, your minimum. I gather that even if this committee were willing to entertain amendments and fix, for example, the problem with section 16 and say that all charter rights supersede or have precedence over the Meech Lake accord; even if it were able to address the concerns of people in the territories, be it the Yukon or the Northwest Territories; even if it were to introduce amendments to solve the problems of aboriginal peoples and not only recognize them but put in writing their right to appear before the next round of constitutional talks and give them precedence over such important matters as fishery rights and Senate reform, for example; even if it were able to address those specific amendments, I sense from your presentation you would still not be happy with that. You think we should scratch the whole thing and start anew with public hearings. Is that correct?

**Ms. Silver Dranoff:** Yes. I do not think this is the sort of document that can be tinkered with. I think that decentralizing the country is a really basic change in our national structure. For that we should have a national consensus and I do not feel we do have a national consensus.

I think we are decentralizing the country just by constitutionalizing the spending-powers provisions. I think we are undemocratizing, if there is such a word, the country by constitutionalizing first ministers' conferences, which I think will take away from the power of all the legislatures in all the provinces and federally. I think it will end up that everybody with majority governments will simply ask all their people to vote along with them. Members of Parliament will be less thoughtful representatives of their people, as

button-pressers at a vote, if there were such a thing as a voting machine.

I am really concerned. In other words, it is a vast and overwhelming change and I do not think you can tinker with parts of it satisfactorily. You can start with it as a very good first—I would not even say “very good”—draft and have that first draft available for discussion, but I do not think you can tinker with it.

**Mr. Eves:** You echo the words of our last witness yesterday. I think you are really telling us the same thing that Don Johnston, the federal member, told us yesterday, and that is to step back and look at the forest rather than the individual trees.

**Ms. Silver Dranoff:** That is right.

**Mr. Cordiano:** I just want to go back to the whole question of a reference to the courts. How would you conceive of that unfolding? How would you draft a reference to the courts on something like the Charter of Rights? Do you have any practical way in which that can be drawn up? I have heard that suggestion made in this committee numerous times, but I have yet to hear anybody say it can be drafted in such a format that would be practically possible for a court to look at.

**Ms. Silver Dranoff:** You would not have a specific fact situation you could use and I do not think it would necessarily be wise to bring out a hypothetical one. But it seems to me it would be reasonable to ask, as one question on a reference, will the “distinct society” clause take precedence over the Charter of Rights? That is a simple question, a question that there is disagreement on. We are reassured, on the one hand, that it does not take precedence because it is an interpretative provision, and on the other hand, that in the mix, when judges sit down to interpret it, it still will have a bearing.

Now, if that simple question were put to the court, I think that is something it could answer. If they answered it, that would stand as a guideline in future cases. I and others like me either would be reassured or would not be reassured. Either it would affect the decision or it would not.

**Mr. Cordiano:** Has the Supreme Court ever answered a question that simply put?

**Ms. Silver Dranoff:** Yes, that is what references to the court are.

**Mr. Breagh:** Yes, separate school funding; Bill 30.

**Mr. Cordiano:** No, that was a particular bill. There is a big difference. We can talk about this in camera when we deliberate—



**Mr. Breaugh:** Or we could even do it in public.

**Mr. Cordiano:** No, we can talk about it when we are deliberating on our report, but I can tell you there is going to be a particular issue with regard to this that is going to be quite difficult to resolve with respect to putting a question to the Supreme Court.

**Ms. Silver Dranoff:** That is what references are. References are questions—

**Mr. Cordiano:** The reference on Bill 30 was a bill. I am sorry but that is a different matter entirely. You had a specific bill that was put to the Supreme Court. That is very—

**Mr. Chairman:** Have you put your question?

**Mr. Cordiano:** I just want to finish this, Mr. Chairman.

**Mr. Chairman:** OK, but I think we are trying to ask questions of the witness and—

**Mr. Cordiano:** It was in the line of questioning. I am sorry, but I wanted to pursue that line of questioning. Then Mr. Breaugh interrupted me, so I had to respond.

**Mr. Chairman:** On a supplementary, and I will permit just a brief concluding remark.

**Mr. Cordiano:** It is not my fault; it is his.

**Mr. Chairman:** All right.

**Mr. Cordiano:** Tua culpa.

**Mr. Chairman:** The chair will gently rap knuckles. Perhaps you could just conclude your questioning.

**Mr. Cordiano:** That is fine. I concluded it.

**Mr. Chairman:** OK. As it happens, the next questioner is Mr. Breaugh.

**Mr. Breaugh:** Now you have me thoroughly intimidated. I do not get all wound out with that. I believe it is quite possible to put a simple, straightforward reference to any court in the land to resolve what has to be resolved. Somebody has to provide us with a better answer about whether the Charter of Rights has just gone out the window or not, because it appears to me that it makes a hell of difference to a whole lot of folks and we had better have an answer to that one way or the other.

Let me take one aspect that runs through what you had to say because it is a concern I share. The notion of a Constitution and constitutional right in this country is relatively new. The interplay between the Supreme Court of Canada and governments in this nation is changing. I do not recall a situation where a Supreme Court decision ever had such a dramatic, immediate impact as

the Morgentaler decision has had on Canadian politics. It is still not resolved. Decisions in the British Columbia Supreme Court yesterday indicate that the provincial government's response, which traditionally, previously would have been accepted as the province's right to do, was struck down. We are going to have to give some consideration to the relationship between the Constitution, the courts and the legislatures.

You mentioned on a couple of occasions here the fact that we do not elect judges in Canada. We do not even vet their appointments very much, though we are discussing that matter and have a proposal in front of us in Ontario. I have no problem with the parts of the accord which say the provinces will nominate people for the Supreme Court of Canada because I do not view that as being much different from doing out in the open what has traditionally been done in Canada. Somebody in the federal government called somebody in the Premier's office and, it used to be, said, "Do you have a well-qualified, totally impartial Tory lawyer who could be appointed to the Supreme Court?" They always seemed to find somebody. Now it is, "Do you have one of those who is a Liberal?" They will find some of those.

I do not mind that it is being done out in the open, but the distinction I want to make is that if the interchange between the courts and the legislatures is going to be different, and I suspect it is, then it becomes more critical, for example, that we have some indication, before they are appointed, what the views of these people are, because they are taking on a whole new role on the Canadian political scene.

## 1100

For example, you talked about the American experience in this matter. They consider it to be absolutely critical that before appointments are confirmed to the Supreme Court of the United States, there is an open vetting process of the nominees put forward by the President. They go before the Congress and some considerable time and effort is spent in determining where a person is coming from, what his background is, what her position is on this—all of that—so that before the confirmation process is concluded, the American people have had an opportunity to see where the person is coming from. As we have just seen, although they do not actually have a fix-it process, if that nominee is not accepted by the Congress, if the person is not going to be confirmed by the Congress, that person withdraws, so there is a bit of a vetoing process.

Do you think Canadian politics could really stand that kind of examination? For example, if

we suggested that this is fine and the provinces can nominate people for the Supreme Court of Canada, but they must have a confirmation process that involves public hearings by the Parliament of Canada, I know several prominent jurists in the country who would go absolutely bonkers at the idea that they would have to doff their gowns and appear before a parliamentary committee and be confirmed in some way. That would really be a radical change in the way justice is handed out in this country. For example, we would have a problem here because we would probably be accused of interfering with the judicial process. In our parliamentary tradition, that is grounds for hitting the road. That is a real no-no. I would be interested in your comments on that.

**Ms. Silver Dranoff:** I wish I had the answer. I raised a problem and I do not know what the answer is. I am uncomfortable with election of judges. I was recently in the United States and, driving along, I saw posters, one after the other, saying, "Elect Judge So-and-so; never been overturned by the Court of Appeals; 15 reported decisions; turnaround rate in judgements better than the other guy," and ads in the newspaper in the same way. My Canadian sense of propriety and dignity, I must say, was somewhat jarred by it. I would not feel comfortable with that.

On the other hand, what we have done is bring into Canada a hybrid system where we have an American Constitution, but we do not have the accountability of our judges the way they do there. I do not know whether electing judges is the answer, but I think that when we, in the Meech Lake accord, constitutionalize things that were not constitutionalized, such as the spending-powers provision, for one, we have to recognize that we are allowing unaccountable people to make the final decisions about what things mean.

This may be an issue that should be part of a conference-table approach to the accord and other matters. We need to be thinking about how this Constitution is affecting our country. We need to think about how we want to choose our judges. I do not know whether the answer is a continuation of the present system, an election or some variety of it, but it is something that we should be paying attention to and discussing. That is part of what this whole Meech Lake process has brought to the fore that I think we cannot ignore.

**Mr. Breagh:** I will just conclude on this. One of the things that bothers me a bit is that on the surface there is not a big change here. A

public process, a known way of going about this, would be fine. The difficulty that occurs to me is, what if Quebec nominates someone to the Supreme Court of Canada and the federal government says no? There is no process established here for validating why that person is not an appropriate appointee to the Supreme Court. That is blackballing in my book.

If the federal government retains the power to actually make the appointment and Ontario now assumes the responsibility for making the nomination, if Ontario puts forward a very eminent jurist and the federal government can say no but does not have to explain why that person is not worthy of serving on the Supreme Court of Canada, we could ruin careers here in the absence of any public reason being given. I mean, is it because this eminent jurist is a crook? Is it because he is a jerk? Is it because they do not like his political views? There is no accountability for that.

That is the problem I see in the process as outlined here. If we are going to do the one thing, then we have to do some corresponding things that provide for some accountability somewhere. It does not mean that we have to elect judges, but it does mean that—

**Ms. Silver Dranoff:** We have to know who they are.

**Mr. Breagh:** Exactly.

**Ms. Silver Dranoff:** I do agree with you on that. I did not deal with that point in your question. I do agree that we need to know who these people are, and what their views are and what their integrity level is.

**Mr. Chairman:** A month ago or a couple of weeks ago, the Attorney General (Mr. Scott) made some suggestions in terms of provincial judges about trying to get more input. I guess it was centred more on receiving suggestions and recommendations from a much broader range of people, although it seemed to me there was, within that idea, something that would take one beyond, perhaps not to a legislative committee, but to where we would have more information, apart from Meech Lake, about the whole process of appointing judges.

I guess you are really speaking to that point. How do we get to know more about the people who will be sitting in judgement on whatever it is right through the whole piece, whether as a provincial judge or on the Supreme Court. Have you seen that speech?

**Ms. Silver Dranoff:** Yes, I did. I heard about that. I have not come to any conclusions myself



on what the best way is of choosing judges except that I would appreciate a greater accountability, a greater sense of democracy.

I know we are getting off topic but you are asking me about it and it is something within my experience. I would like to see some kind of a management system within the judiciary so that there is a training system and so that there are bosses, so that the judges have bosses like everybody else.

**Mr. Chairman:** Like the Blue Jays. There will be spring training.

**Ms. Silver Dranoff:** That is right.

**Miss Roberts:** I might make one or two comments from what you have already said. The charter is something new and we, as Canadians, are just learning to live with it, and some of the decisions that have come down are startling to us, very startling. I think we have to change many ideas and thoughts because of the charter. As to your comments with respect to judges being unaccountable people who are making decisions, we must always remember that all legislatures can go back and change the laws. Even the Constitution itself can be changed, and the charter itself can be changed. That is what we are attempting to do right now through the Meech Lake accord.

From your comments, I would assume that you do not like anything in the Meech Lake accord; there is not one thing there that is what you would consider appropriate to be done. You suggested taking it back to the conference table and retalking it. Let us consider that process. If we do turn it down, how are we going to deal with the changes that have been suggested? What is the process going to be, that you would suggest, other than taking it back to the conference table? What happens after it goes back there? There are going to have to be some changes sooner or later.

**Ms. Silver Dranoff:** I am not prepared to outline a process today except to say that, within the process, certain things would have to be done. I would think that members of parliament of all parties in every province across the country and in the federal Parliament should be involved in the process, just as all representatives of special-interest groups across the country should be involved in the process.

Now, whether you have a consultation-type conference or whether you have a royal commission that convenes in every province, really, the point is that everybody who is involved, which is everybody in the country, has to have input and it is not something that can be done quickly. I think it has been done too quickly.

What I am really saying, then, is it is not something for first ministers to decide and then bring their parties along with them. It is for the elected representatives in this country on a very broad scale to discuss.

**1110**

**Miss Roberts:** The most important thing, if I might say just very briefly, is the process. We have to give them some advice with respect to how to do this. This charter is new, the constitutional changes are new, and we are looking for some input as to how to help the process because the next time around, even if Meech Lake does not pass, they may do the same thing. This exercise should at least have us in the process. If you have any ideas in the future or even now, I think we, as a committee, would appreciate hearing those ideas as to how we can change this process.

**Ms. Silver Dranoff:** I understand. What you are saying is, in the final analysis, somebody has to make the decision, and who is that somebody going to be?

**Miss Roberts:** That is right.

**Ms. Silver Dranoff:** The question is, is it going to be the legislatures, using or invoking party discipline? Is it going to be the legislatures of the provinces on a free vote? Is it going to be a plebiscite or a referendum?

The most democratic means is, of course, either a plebiscite or a referendum. I am not sure that the issue is not so complex that that would necessarily be a workable means, but I think that, for changes this basic, you have got to have as democratic and as broad a decision-making process as possible.

I would prefer to see some kind of a constitutional conference convened which had representatives of all political parties from all provinces, and elected members of parliament from all provinces, and free votes in the legislatures. Then at least whatever decision is made, even if it is a decision I do not agree with, I will feel it has been made democratically and I will be able to live with it.

**Miss Roberts:** Thank you. That is helpful.

**Mr. Allen:** Thank you very much. I appreciate your coming and providing us with your reflections on the Meech Lake accord, Ms. Dranoff. You have obviously spent some time working over the issue, in company with others, and it is helpful to have reflective and considered opinions before us.

I guess I have some problems with both your article and your paper in some respects and I

would just like to ask you a few questions. First of all, let me preface this by saying that in many political issues there comes a kind of qualitative turning point where, suddenly, it becomes the thing to oppose, and then the language begins to escalate and becomes perhaps a little bit extravagant. It then becomes increasingly difficult to consider the matter in terms of rational evaluations, clear meaning of terms and what have you.

I must confess, I find a little bit of that in your article when you, for example, in the middle of it, suggest: "Handing every province the power to veto future changes in political institutions and to appoint judges and senators may lead to deadlocks. The accord effectively creates a new and different Constitution." If it did, indeed, do precisely what that language says, it would be a very different Constitution.

But, of course, it is only some aspects of political institutions that are proposed to be touched by unanimity as distinct from the other amending formula. The power to appoint judges and senators is not going to be given to the provinces. It is clear in the accord that that is a shared proposition of nomination, on the one hand, and appointment on the other.

I just wonder, if our concern is to get the premiers back to the table to discuss this thing and to get perhaps a few of the important changes that are necessary—and which I think are necessary—into the accord, is it not making it more difficult, and not more easy, for them to go back to the table if one insists on simply taking the accord and extrapolating from it rather extravagant conclusions, which you seem to do in that paragraph?

It may serve the purposes of attack to sow confusion and to portray as apocalyptic what is rather less than apocalyptic, but does that not make it more difficult for our first ministers to go back to the accord and to say, "Perhaps we can consider the problem of the Northwest Territories and the Yukon, or perhaps we can consider inserting a statement with respect to the primacy of the charter over the Meech Lake accord"? To do a couple of those things could very well resolve an awful lot of the problems that a lot of the people are having around it.

Is it fair to them and to the process even, and to ourselves, to write as though things were happening which were much more extensive than in fact are proposed by the accord?

**Ms. Silver Dranoff:** I stand by what I wrote. What I wrote envisions the impact of the accord, if not today and tomorrow, next year and in 10 years from now. While it may seem inappropriate

in language to you because it is not happening at the moment, I would say that the impact of the accord's changes will make that happen in the future.

**Mr. Allen:** But there is no way you can demonstrate that that will follow, because there are other lines that development can take, that can happen in a dialectical situation such as our federation is, surely.

**Ms. Silver Dranoff:** There is no way that those who are for the accord can demonstrate that the opposite will happen. That is the problem. It is not clear to me what will happen as a result of it.

You say that language like that may prevent the first ministers from rethinking aspects of the accord. I do not think my language in that article is going to affect the first ministers' decisions to change or not change the accord. It has been my observation that nothing anyone has said has budged any one of them one iota. They are all standing very firm, and I think that is the unfortunate part of the process.

It is all very well and good for them to come up with the best possible accord that they think would work, but then they have to justify it, they have to do feasibility studies, they have to show that somebody has given some thought to how this is all going to work out in practice. It is not my impression that is what has happened.

**Mr. Allen:** Something is happening in the press, if not in reality, and I am not sure what that is. A few days may tell us.

The second concern that I have comes back to a couple of your comments. You ask on page 6, "How can anyone accept the simplistic statements of pro-accorders that it's only to get Quebec into the Constitution?"

Of course, I think it is obvious to all of us that there are some changes that are proposed and some adjustments that are described that accompany that. You amplified that a little earlier on page 3, where you deal with the five terms that Quebec proposed and then go on to your further paragraph.

I guess the dilemma I personally find myself in is that persons like yourself making these particular points seem, on the one hand, to be rejecting all the language of special status. "We don't want Quebec to have a role or powers that are different from other provinces in the country." Yet, at the same time, we are in a political situation, a constitutional situation in the nation where it is necessary to respond to a province that is different, with a different predominant language, with significant cultural differences, and



somehow we have to allow for some protection, some special measures that will enable that particular culture and language to survive in the context of the North American continent, etc.

If you back away from enshrining anything in the Constitution that responds to all that, then you are in a situation where you are going to have to say, if you respond and preserve equality of provincial powers and so on, you are into a situation where the other provinces have to be cut in on the deals, which is what Meech Lake did.

I submit that you cannot have it both ways. You cannot constantly be hammering against special status, or something like it, and backing away from that, and then when something happens move in the direction of another solution without somehow incorporating other provincial equality propositions.

How do you square that circle? I have not heard anyone coming forward critical of the deal from the perspective of rejecting special status who has any other solution in terms of the overall strategies that Meech Lake seems to embody. How do you square that circle personally?

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**Ms. Silver Dranoff:** I think that before Meech Lake, Quebec had special status. Without constitutionalizing the words "distinct society," they have historically had, and in the existing Constitution have, a special status. But by putting in the words and giving them this greater role, by constitutionalizing immigration—immigration used to be, just like spending powers, a political bargaining process between the provinces and the federal government. Now immigration is being constitutionalized.

All the five points that Quebec wanted, and that now the rest have as well, put it within the Constitution in a different kind of way. I am not against continuing Quebec's special status in Canadian society. It is not only a historical fact, it is also a constitutional fact. But changing it, as the Meech Lake accord did, and giving the same thing to the other provinces, is a problem.

**Mr. Allen:** To take the question of immigration, no new powers over immigration are given to any province. Immigration was a shared jurisdiction in the 1867 agreement. Nothing fundamentally has changed. All that is said in Meech Lake essentially is that just as Quebec has taken advantage of the 1867 Constitution in order to work out some arrangements with Ottawa whereby they agree as to how immigration will happen and under what terms with respect to that province, so now Meech Lake simply says that other provinces may be permitted to enter into

similar kinds of agreements. So what essentially has changed? What have we constitutionalized that was not constitutionalized before?

**Ms. Silver Dranoff:** The immigration agreement that Quebec would get a certain percentage of immigrants who come to Canada is now a constitutional right of Quebec's. It was not a constitutional right before. When you talk about the impact of the "distinct society" clause on the immigration provision and the Charter of Rights and you look at how this is all going to impact, one of my favourite examples of practical impact is: what happens if Quebec says, "We have a constitutional right to 25 per cent of the new immigrants to Canada," and those new immigrants want to move from Quebec to another province?

They say: "We have a right to move. We have mobility rights in the charter." What takes precedence then, the charter's mobility rights or the rights of Quebec to promote its position as a distinct society by having immigration at a certain level within Quebec? There would be an interesting practical example of whether the charter is going to take precedence or not.

**Mr. Allen:** That question was asked, raised and answered in the Langevin discussions. They allowed the mobility rights to take precedence, as written into the Meech Lake accord.

**Ms. Silver Dranoff:** I hear you say that. I am not familiar with the part of the accord you say does protect that because it is my understanding it does not. But there you are, that is what we have on the whole Meech Lake issue: strong differences of opinion about what it means.

**Mr. Allen:** But it is not a difference of opinion. Go home and read the immigration section. It and the mobility rights were significantly changed at the Langevin discussions. We have been through that bundle in the committee, and the mobility rights were written in precisely because that was a legitimate concern over the Meech Lake first draft. You are quite right about that, but it was written in.

I am just saying that to refer to the immigration aspect of the agreement as somewhat constitutionalizing something that was not there before does not alarm me particularly, if it is only an extension of the powers that were already there and if nothing dramatically unfair happens in the process. As long as there are mobility rights, I do not see a problem in Quebec having its share of national immigration affirmed as a right in the charter. It is reasonable. Any other province can ask for the same. It does not tread on anybody else's toes, basically.

I understand your concern about overconstitutionalizing. One can write too much into a constitution, quite clearly, and I have some sympathy with that perspective you are trying to draw before us. I was really just trying to get you to work over the squaring of that circle. If not special status that is fairly clear and reasonably explicit and if not a rearrangement of provincial attributes, if you like, and participation in the federation which would consort with anything new that was given to Quebec, then where do we go? You cannot close off both doors and still want to go somewhere in this federation. That is my concern.

**Ms. Silver Dranoff:** I am not against the recognition of Quebec as a distinct society if it were a term that did not have difficulties attached to it. In the way it is done in the accord, I have difficulties with extending the equality powers to the other provinces. I do not think I have anything further that I can usefully add to your comments.

**Mr. Allen:** My concern is that it is very difficult to find language that is totally and entirely unobjectionable in these matters, as we are finding out.

**Mr. Chairman:** Mr. Offer, if I might just note the time, we still have two other presentations this morning.

**Mr. Offer:** You are too kind.

**Mr. Chairman:** I know you are always brief, to the point and full of pith and substance.

**Mr. Offer:** To the pith and substance.

**Mr. Chairman:** Just while we are on the business of interpreting words and expressions.

**Mr. Offer:** You are taking up all the time.

If I might, I would like to talk about the whole question of this court reference that you brought up earlier. It would seem that one of the major reasons would be to add a particular certainty or clarity to the meaning of one matter over another. In your submission you have talked about taking this type of reference, and I know that we have dealt with it with respect to some earlier questions. Keeping in mind what these particular provisions of the agreement are—and I know that you alluded to their being interpretative provisions, but still there is no understanding with respect to how they would be used in dealing with the rights sections in the charter—you then talk about the charter giving rights absolutely.

We know there is also section 1 of the charter, which talks about these absolute rights not being absolute in certain terms and circumstances dealing with the whole question of discretion of

courts and dealing with the whole question of the particular fact situation. My question to you shortly is, because we have all of these different, very important elements that have to be taken into consideration, in all practicality, what type of certainty could be achieved in terms of taking a court reference? What would be the certainty?

I see that there would not be the certainty emanating from a court reference that others might result in, because of the fact of these different elements that will always be taken into consideration by courts. Rather, it is an evolution of court decisions. It is an evolutionary matter. It is discretionary, depending upon the particular fact situation, depending on the particular point in time. The Charter of Rights contains particular terms which will, over time, be determined by judicial interpretation that might change over time. If that is the reason for the court reference, are we not in some ways asking for something which is not really possible?

**Ms. Silver Dranoff:** You refer to section 1. Section 1 would really only have impact on a specific situation where a court would have to decide whether or not it would be reasonable to do something in a free and democratic society in that particular case.

**Mr. Offer:** Right.

**Ms. Silver Dranoff:** But a reference talks instead to rather larger issues; for instance, the one question which I raised, does the charter take precedence over the "distinct society" clause or does it not?

The problem is when they added the multicultural saving clause by saying that nothing in the accord affects the multicultural rights, for example, they therefore raised the implication that everything in the accord can affect everything else in the charter. That is simply a basic rule of statutory interpretation that has been raised by their tinkering and adding section 16 as they did.

I think a reference could be very useful. It could be very useful either to provide certainty or, as I guess I consider more likely, to shed light on just how difficult the drafting may be and perhaps leading the legislators in the direction of improvements.

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**Mr. Offer:** The problem I am really grappling with is with respect to this whole court reference issue, that the reason for any particular court reference would just not meet its initial reason—

**Ms. Silver Dranoff:** But they could say the charter takes precedence or it does not.



**Mr. Offer:**—because the courts will always take into account other sections of the charter, certainly, other points in the Constitution as a whole in dealing with the particular fact situation.

**Ms. Silver Dranoff:** Yes, but I think they can say, as a matter of interpretation, the charter takes precedence over the “distinct society” clause or it does not, for one example. They may have difficulty in defining what “national objectives” means in the “spending powers” clause without a particular fact situation, but it would be a matter of framing the question for them. Some aspects of the accord would require a specific fact situation, but many would not.

**Mr. Chairman:** Thank you very much for coming this morning. As the committee has proceeded along and as we have started to grapple with some different approaches and avenues, it has been very useful to have this kind of exchange to try to focus on what some of those roots are. We want to thank you for the time and effort you have put into your presentation, for the other article which you brought along as well. We very much appreciated the interchange this morning.

**Ms. Silver Dranoff:** Thank you for a fair hearing.

**Mr. Chairman:** I would like now to call upon the representatives of the Ontario Metis and Aboriginal Association, Charles Recollet, the president, and Chris Reid, who is the constitutional legal counsel for the association. Welcome, gentlemen. We thank you for coming this morning. You have provided us all with a copy of your submission. If you would like to make your presentation, we will follow that up with questions.

#### ONTARIO METIS AND ABORIGINAL ASSOCIATION

**Mr. Recollet:** As the chairman has mentioned, to my right we have with us Chris Reid, our Metis constitutional lawyer, on behalf of the organization.

The Ontario Metis and Aboriginal Association, formerly the Ontario Metis and Non-Status Indian Association, represents Ontario's over 200,000 aboriginal peoples living off-reserve in Ontario in urban, rural and remote areas. Our members live in communities all across Ontario.

It is said that a country's constitution should represent a vision of what that country is and should be. If we accept this principle—and we at OMAA do fully agree with it and accept it—we must ask ourselves, “Does the Langevin accord

accurately reflect what Canada is and should be?”

The aboriginal peoples of Ontario answer that it most certainly does not. The accord promotes a view of Canada which ignores the first founding people of Canada and Ontario—the aboriginal peoples. It provides a vision of the future in which aboriginal peoples cannot hope to share. The accord completely ignores aboriginal peoples and their place in the existing constitutional order and totally misstates Canada as it is. It takes us back to a myth of 120 years ago that the fundamental character of Canada is of the French and the English.

The accord proposes far-reaching changes to each and every constitutional document that exists in Canada. Some of these changes are good in so far as they recognize and give effect to Quebec's uniqueness. Others, some due to careless drafting and some deliberate, will lead to disastrous results for the aboriginal peoples. The accord sets the stage for a massive and ever-greater expansion of provincial powers, leaving aboriginal peoples without any realistic chance of being included in the constitutional order. It ransoms our long-term future for the short-term gains of some first ministers.

The Constitutional Act, 1982, contained a provision for eventually making aboriginal peoples partners in Confederation. The 1982 act recognized certain realities about Canada and the need to provide some countervail to allow our peoples, otherwise weak and without influence, to negotiate our place in Confederation. The 1982 act contained these provisions. The 1987 accord abandoned them.

Great care and extensive political and public debate went into the delicate balance of the 1982 Constitution Act. No change or alteration to that arrangement should be considered in haste. Many premiers have spoken again and again of the resistance to the idea of amending the Constitution in haste on aboriginal rights. We find it more than ironic, therefore, that 11 first ministers, over two sessions of heated and isolated bargaining, were able unanimously to agree to a new and extensively revised arrangement for the governance of Canada.

In 1982, it was thought that four main elements were required in altering Canada's Constitution. In referring to them, I am following the precedence in the act itself.

Part I sets out the Charter of Rights and Freedoms. This promised to set the benchmark for future government-citizen relations in Canada.

Parts II and IV established specific provisions to promote the inclusion of aboriginal peoples in Confederation. This package, which was seen then as a first round of reform, included section 25 of the charter. Part II itself was the basis, the foundation, for an aboriginal charter of rights and part IV. Part IV provided a unique mechanism for constitutional reform in this area, the precedent of constitutional conferences between first ministers and the aboriginal leadership. In part III, the principle of equalization was enshrined.

Finally, in part V, a new and detailed amending formula was set out to provide for both stability and flexibility. Stability was crucial in areas that were not to be left open to occasional or too-easy amendment. Flexibility was very important, given the recognized need for further reform.

It is the changes to the aboriginal package and to the amending formula that I am most concerned with. Neither of these issues was mentioned in Quebec's five-point demands. I wish to stress again that I have no major quarrel with Quebec's demands or with those parts of the accord which address them. Neither of these issues was raised by Quebec, but they are in the accord, nevertheless, for whose benefit I do not know.

First, the amending formula: In 1982 the amending formula contained six major procedures to address nine types of issues. For this reason, I call it the six-and-nine formula.

First, there was what I call the sacred list of national institutions. These include the sovereign parliamentary structure of government, the composition of the Supreme Court, the amending formula itself and minimum linguistic and provincial representation guarantees.

For these matters, on which there was such a basic and lasting agreement that no further changes could be lightly forecast or invited, unanimity was the formula adopted. This was appropriate since unanimity was seen as the equivalent of saying: "On these matters we are agreed. We have reached as close to perfection as possible, and to even hint at future tinkering can only damage the delicate fabric of the nation's existence."

The second procedure was the general amending formula, which was developed with four special types of issues in mind.

The third, fourth and fifth procedures are relatively uncontentious. They involve, respectively, sections 43 to 45, inclusive.

It is to the last, the sixth procedure, that I would like to draw your attention. This was the aboriginal amendment formula. As I said earlier, this was set out in part II and part IV of sections 35 and 37 respectively. I stress that the 1982 act contained this formula as a separate and unique one. It was to involve the first ministers' conferences with aboriginal leaders that were legally required to identify and define aboriginal and treaty rights. No other part of the amending formula mentions the need for first ministers' conferences. Indeed, the only other mention of first ministers is in section 49, requiring a conference within 15 years to review the amending formula as a whole. Have the Meech Lake accord and the Langevin meetings now spent section 49? The amending formula has been reviewed, and with a vengeance.

The 1987 accord proposes to replace the six-and-nine formula with a five-and-seven formula. That is really the essence of the change to the amending formula. The 1982 act saw nine sets of issues as important and set out six procedures to address them. The 1987 accord reorganizes the picture of what is important in Canada by reducing the list to seven and limiting the ways to address them to five. The first way it does this is by affirming entirely the termination of the unique aboriginal amendment formula.

The second way is to lift all of the items that were specifically identified in 1982 as in need of reform—all of these items listed in section 42—out of the general amending procedure and shift them over to the unanimity rule.

#### 1140

It is this move that has, quite rightly, come under so much fire. Why? Because it means that the worst inclinations of future politicians will be pandered to. If Senate reform or making the Yukon a province is on the agenda, it will invite every single province to ransom the proposed changes for whatever the province may want from the federal government. Every other province will demand equal treatment. This will mean that every effort to amend the Constitution on one issue will result in a repetition of Meech Lake—an unending spiral of tradeoffs, payoffs and buyoffs.

Instead of the unanimity rule being a cautious and minimal one aimed at safeguarding the essence of what Canada is, it will be transformed into the major amendment rule, ousting the more flexible and realistic section 38 procedure.

The unique aboriginal amendment procedure has now been terminated and the draft before you seals its fate. Some people maintain that this is



not the case. They say section 38, the general formula, exists in case we ever come to make amendments on aboriginal rights.

This attitude is mistaken. This forgets that the section 37 provision for first ministers' conferences had a purpose and a reason that remain unchanged. Aboriginal peoples require the protection and sanction of the Constitution when we deal with the first ministers. As they showed in 1981 and at Meech Lake, they cannot be trusted to deal fairly with our interests when we are not represented or present and when the public is not provided a clear view of the proceedings.

Second, this attitude ignores the fact that section 38 is not the amending formula for aboriginal issues. Part II and part IV provide for a unique formula that allow us to use section 38 or sections 41 to 45, inclusive; that is, an amendment on aboriginal rights could have used the unanimity rule, the general procedure or even the section 44 procedure that requires only Parliament's resolution. It will all depend on the subject matter. In all cases, however, the procedure would require a first ministers' conference to be held with the aboriginal leadership. That is what was unique about the aboriginal amending formula, and that is what the Langevin accord ignores and terminates.

Several months ago, after the failure of the aboriginal FMC in March 1987 and around the time of the Meech Lake meeting, the aboriginal summit leadership took a long, hard look at the process of constitutional reform in Canada as it affects the aboriginal peoples. They drew three conclusions.

First, the framework for constitutional development established in 1982 was seriously in peril. This was because the amending formula established in 1982 had contained a unique instrument for completing the circle of Confederation, the section 37 process. On April 18, 1987, section 37 disappeared.

The second conclusion was that the first ministers had decided to move on to their own priority agenda for changing the Constitution of the country, a list of initiatives that is long and only half-drawn, but one that has been in abeyance since 1982 because in many cases the changes involved require Quebec's assent and Quebec had refused to participate in any constitutional amendment process for the last five years.

The third conclusion we drew was one shared by many observers of the aboriginal process over the last half decade. We saw that a new and invigorated framework was required to drive us all towards a lasting agreement on how aborigi-

nal peoples are to be included in Canadian Confederation.

The meetings from 1982 to 1987 were based on the understanding that aboriginal rights were the number one, the first round of reform. The process set in train in 1982 also assumed that a few years of concentrated effort would be sufficient and that a permanent provision for aboriginal constitutional reform was not required. Clearly, we were wrong on both counts.

So what is it that we need? I want you to pay close attention to section 35.1 in the 1982 act. The draft resolution affects it in at least three ways. First, the change to the amending formula moving Senate powers under the unanimity rule means any self-government amendment in the future which tries to address subsection 91.24 will require unanimous consent. In addition, this change means subsection 91.24 is affected by the resolution, a fact that calls into effect the section 35.1 conference requirement.

The careless and open-ended drafting of this resolution will require that a special constitutional conference with aboriginal peoples will have to be held before the resolution can be given royal assent.

There has been much talk about first and second rounds of constitutional reform. From the recent speeches of the first ministers, it is clear that they consider the first round as having been substantially completed with the drafting of the Langevin accord. The second round, as elaborated in section 13 of the accord, speaks to Senate reform, fisheries and other agreed-upon matters. What happened to the aboriginal agenda?

Before the next steps toward reform are undertaken I would have hoped that the first ministers would have agreed that, with Quebec's inclusion secured, the first priority would be to complete the circle of Confederation by providing for an amendment recognizing the right of aboriginal self-government. The first round will not have been completed until that task is met. It is difficult, for instance, to envision any appropriate discussion of Senate reform or fisheries that does not require prior or parallel deliberations on these issues, on the issues of aboriginal representation in the former and the implications for aboriginal and treaty fishing rights of the latter.

We will no longer accept being bit players in the centuries-long drama of the French and English only in Canada. We refuse to pay yet again for the failures and compromises of others. In 1982 a distinct provision, written across three different sections, was added to the Constitution

to allow aboriginal peoples to find their place in Confederation. It is now proposed to gut that provision and forestall for ever the completion of the circle of Confederation. Is it only ironic that this should happen under the banner of completing Confederation by satisfying Quebec's demands and paying the high price of concurrence exacted by the other premiers, or is it deliberate?

We are told that the Langevin accord was solely concerned with Quebec, and that aboriginal matters were not addressed positively or negatively. This is simply not true. The place of aboriginal peoples in Confederation was discussed. Premier Hatfield raised it. Premier Pawley raised it. In the end, we were asked to accept a fake status quo. Section 16 does not maintain that status quo. It attempts to cover up what the accord really does, which is to oust aboriginal peoples from the status we achieved in 1982 and permanently close the door on any realistic hope for completing the circle of Confederation. Aboriginal matters were most certainly raised and discussed on April 30 and on June 2, just as they were discussed in November 1981 when the premiers demanded that aboriginal rights be thrown out of the patriation package.

The only difference is that in 1982 we had allies in Parliament and in the provincial legislatures who demanded that our rights be reinstated. What of 1987?

I would like to point out that I have read the text of the presentation by the chiefs of Ontario to this committee and I am in agreement with their comments. I have, in turn, shared the text of this speech with the chiefs and I have been advised that they share the Ontario Metis and Aboriginal Association's concerns. It can fairly be said, therefore, that the accord as it now is, has been rejected by representatives of all of Ontario's aboriginal peoples.

In summary, the aboriginal peoples have identified three fundamental areas of concern with the Langevin accord:

1. Nonrepresentation in the process by which the amendments that directly affect us were developed and decided upon;

2. Termination of the only process of constitutional reform for aboriginal peoples, in the absence of which aboriginal peoples have no forum in which to pursue amendments on self-government and related matters or to address the direct and indirect impact of future second-round constitutional reforms on our rights and status;

3. Abrogation of the fundamental rights of northerners, more than half of whom are aboriginal, particularly with regard to the establishment of provinces in the north and representation of northerners in the Supreme Court.

I have stressed the first two, but I cannot speak of OMAA's concern with the accord without mentioning our solidarity with our northern brothers and sisters.

The following constitutional action is required to meet our fundamental concerns, whether by amending the accord or initiating separate companion amendments for prior or simultaneous promulgation:

1. Reinstatement of a constitutional requirement for ongoing constitutional conferences on aboriginal matters, an initiative that would legally require the holding of a first ministers' conference at which aboriginal and territorial leaders must be present as full participants;

2. Guarantee of aboriginal participation in the so-called second round of constitutional reform where our rights or status are affected;

3. Clarification of the accord to ensure equitable representation of the north in the Supreme Court, and

4. Provision for equitable treatment for northern Canadians by at least maintaining the current section 38 rule for the establishment of provinces in the territories or preferably, by restoring the pre-1982 bilateral procedure by which all other provinces have entered Confederation.

It is clear that all of these issues will be more difficult to address after the accord is promulgated. Aboriginal peoples cannot simply wait until after the accord is law. The political basis and opportunity for addressing these issues hinges on the desire of governments to pass the accord into law without significant opposition. There are no obvious tradeoffs or inducements after passage of the accord, especially since aboriginal peoples and northerners lack the resources or political weight needed to generate such inducements. These issues will also have to compete for attention with other matters, including Senate reform, fisheries, and annual meetings on the economy.

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We have found over the last century that it is only when a clearly structured and legally mandated process for reform is in place that the conditions conducive to reform can be generated. Without such a process, aboriginal peoples and their rights are quickly forgotten and overwhelmed by other developments over which we have no influence.



In concluding my remarks, I wish to suggest that there are three options that you can consider.

First, you can amend the accord as we have asked in our submission. As far as the so-called "second round" of constitutional reform is concerned, we can provide you with the wording for an amendment to section 50 that was drafted by one of the governments involved at Meech Lake but not pursued.

As a partial compromise, in the face of political difficulties of getting the 11 legislatures to agree to the same amendments, you may wish to endorse companion resolutions to the Langevin accord that specifically address aboriginal peoples. The purpose of one such resolution would be to reinstate the section 37.1 procedure. A draft companion is attached to my submission as annex 1.

Companion resolutions are simply resolutions amending the Constitution that are initiated for adoption before or at the same time as the Langevin accord receives attention. The procedure is as follows:

1. Agreement to a text for each of the amendments;
2. Drafting appropriate resolution language;
3. Tabling of the resolutions in the Senate or in a provincial legislature;
4. Holding the appropriate votes that, if supported, would formally initiate the procedure for amending the Constitution.

Ideally, provinces should give formal consideration to the companion resolutions before the House of Commons is asked to vote on them. The latter point is made in the context of statements by federal government spokespersons that it was one or more provinces, and not the federal government, that demanded the wording of the Langevin accord which now gives rise to the issues addressed by the companion resolution option. The House of Commons would therefore probably await provincial consideration before assenting or dissenting to any of the resolutions.

In annex 1, it is proposed that the process of constitutional reform that was legally a part of the Constitution between 1982 and 1987 be reinstated as an ongoing undertaking. It would be essential to add the aboriginal conference requirement to Part II of the Constitution Act, 1982 since this would keep all of the related clauses in the same part and give added protection to the amendment. The amendment would involve the general procedure for constitutional amendments, requiring the support of two thirds of the provinces.

Importantly, this route would invoke section 35.1 of the Constitution Act, 1982 and a formal conference of first ministers with aboriginal representatives would be called for. In effect, the Senate or any provincial legislature, simply by initiating an amendment resolution on this subject, would trigger the need for a first ministers' conference at which aboriginal, as well as territorial representatives, would be full participants. Section 35.1 binds all first ministers to meet with aboriginal leaders before any amendment is made to Part 11.

The conference that would be triggered would not have to be a lengthy affair. With basic support for this companion amendment, elaborate preparatory conferences at the ministerial and officials' levels would not be required. Legally, however, section 35.1 would be invoked and aboriginal peoples would demand that the legal commitment of the first ministers be upheld. The conference would, at the very least, be an opportunity to explain to Canadians the need for the amendment and afford an opportunity to ensure complementary action by all legislatures.

By initiating such companion resolutions, the Ontario government can address one of the fundamental concerns of aboriginal peoples while, at the same time, avoiding any legal change to the Langevin accord and, thereby, avoid any threat that the accord would unravel any process of revision. The companion resolution option does involve amending the Constitution but does not involve changing so much as a comma to the constitutional amendment, 1987 now before this committee.

As regards such matters as Senate powers, however, the accord itself must be amended to prevent section 9 of the accord from affecting subsection 92.24 and bringing section 35.1 into effect.

Finally, we could choose to do nothing. Some of you could issue a minority report, I suppose, but that will still be a minority report. Aboriginal peoples would have to draw their conclusions about this Legislature from what the majority decides. In that case, I am afraid the so-called special relationship of the crown to aboriginal peoples would be at an end once and for all. We would then know where we stand.

As I pointed out, if you do choose inaction, then you will be paving the way for a contest between aboriginal peoples and the legislatures and Parliament. The basic issue will be section 35.1. Now we have proposed a solution and we

are willing to work with you on it, but it is your commitment and you bear its burden.

OMAA does support the Quebec people in their efforts to have the Constitution amended to recognize their distinctiveness. OMAA supports the five-point demands of Quebec and those parts of the Meech Lake Accord that reflect them, but OMAA does not support the Langevin deal as it was drafted.

I sincerely hope that you will deal fairly and justly with our concerns. Thank you.

**Mr. Chairman:** Thank you very much. You have not only set out the problem but also, in a very interesting way, suggested one avenue to get out of it. At this stage, we certainly are aware of a number of problems. We appreciate that you and your colleagues have obviously sat down and given a very great deal of thought to how to resolve that problem. I think it raised some very interesting ideas.

**Mr. Eves:** Mr. Recollet, it is good to see you again. Mr. Reid.

I think you have made a very ingenious presentation to this committee. Most groups that have appeared before us have not really come up with any new process we could look at which would perhaps do away with the necessity of amending specific sections of the accord. I think you are to be complimented for taking that initiative and coming up with a novel suggestion which, I am sure, this committee will look at. We look forward to your supplying us with the draft wording for an amendment to section 50. We would appreciate receiving that.

I think your comment on page 13, where you say, "There are no obvious tradeoffs or inducements after passage of the accord, especially since aboriginal peoples and northerners lack the resources or political weight needed to generate such inducements," also shows that you are quite politically astute. I think you have hit the nail on the head there quite accurately.

I want to talk about this idea of the companion amendment. I think one of the concerns that many, if not all, members of the committee may have is that we are operating under a time line, which may seem to be great to some but perhaps not great to others, so when you start talking about drafting an agreement on such an amendment, how do you see this procedure, the process taking place, and do you think that all 10 legislatures and the House of Commons would have time to go through this process you are suggesting with respect to your companion amendment?

**Mr. Recollet:** As I have mentioned, it is a suggestion. I further mentioned in my report that when Meech Lake and the Langevin accord were drafted, there was no aboriginal participation in the drafting of the Meech Lake accord. The only political route our national organizations had access to was the Canadian Constitution, the highest law of the land. When we sat down with the provinces, territories and the Prime Minister of Canada, we were hoping to have an amendment to entrench the right of self-government in the Canadian Constitution within the context of the Canadian federation.

Apparently, that did not take place, as everybody has seen over the past five years. I was mentioning in my presentation that I think they used the whole process to stimulate issues such as free trade and the Meech Lake accord. The forum, which is designed and set out to help the aboriginal peoples, who for the past 200 or 300 hundred years have been ignored by previous governments, was again at an impasse. As I mentioned, the companion resolutions are very minimal and basically a last resort, because we would like to see an amendment to the Canadian Constitution and another, second round of constitutional reform.

With regard to companion resolutions, we can work out the wording. They are designed to set the stage for possible resolutions in dealing, for example, with the province of Ontario. If it requires a bilateral process, we are prepared to do that. If it means working within the federal government and the province, we are prepared to do that also. Maybe Mr. Reid would like to—

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**Mr. Reid:** It is probably important to note that no Legislature could kill the accord, even if it wanted to, before 1990, so we do have at least two years for the process of companion resolutions to take effect. The first one, attached to Mr. Recollet's speech, is the one that would of course require a first ministers' conference to deal with an amendment to part II of the act of 1982. That would be the procedure. Simply by initiating a resolution, such as the one attached to the speech, the Ontario Legislature would force a first ministers' conference to consider that proposed amendment to the Constitution. As Charles said in his speech, it probably would not require lengthy debate or meetings. It would probably be a simple matter since it simply calls for a revival of aboriginal constitutional discussions.

We can certainly provide the committee with wording for two other companion resolutions as



well, the draft wording which would deal with appointments to the Supreme Court and the creation of provinces.

**Mr. Eves:** I take it that you would prefer some specific amendments to the accord but that your bottom-line position, if you have one—or, to put it that way—is the companion amendment procedure. Some of the other aboriginal groups that have appeared before us have had a much, shall we say, weaker bottom line. I think their absolute bottom line was that the very least they would like to see was that the whole subject of aboriginal rights and pursuit of self-government be added to the list, in fact be first on the list, at the next round of constitutional talks, ahead of Senate reform and fisheries.

I gather that your bottom line is somewhat stronger than that. Is that a correct assumption?

**Mr. Recollet:** That is correct. I think our bottom line is that we support the recommendation by the federal Senate committee and recommendations 6 and 7—if you had an opportunity to review them—regarding the distinct society of Quebec, the recommendation of having distinct societies for aboriginal peoples and the issue of recognition of treaties which relate to land claims for Ontario.

We would like to see the second round of constitutional reform, but as we mentioned in the presentation, we had a list that is exhausted by the premiers representing the provinces and the representation from the territories and the federal government. I think the aboriginal peoples, being the first inhabitants of this province and Canada, deserve at the least the right to have self-government within their own country.

At the same, if you bog it down with other constitutional matters where you bring in the local leadership of the provinces, the federal government and the territories, it is quite obvious there will be, as I mentioned, tradeoffs, payoffs and deals made on the side and the whole issue of the aboriginal rights will again be put on a back burner.

We would like to see a separate process dealing with the constitutional issue of the aboriginal peoples of this country and this province. It has to be dealt with. Our constituents from all over Ontario—as I mentioned, we live in urban and remote rural areas—are treated like second-class citizens in our own backyards, and yet we have some of our provincial leaders, premiers and the Prime Minister going across all over the world saying that we have been taken care of by their various levels of government, which is not true.

We have people still living in Third World conditions up in northern Ontario, in dilapidated housing which, as you all know, was in that very thin line or circle. You live in a dilapidated shack where it is 40 degrees below outside and you can still see the snow flying but there are no storm windows. If you have poor education, you are going to have poor employment. The whole society is affected within that community.

**Mr. Elliot:** I would like to thank you very much for your presentation, too, because it is a very comprehensive one and because it does give a proposed solution to a very meaningful problem that has been drawn to our attention by at least six presentations now. Those, coupled with the ones from the territories, mean that there are large groups of people out there who were not addressed at all in the process that was followed in coming up with the accord that we are trying to come to grips with here.

What I would like you to help me with is coming to grips with the magnitude of the problem. As was said previously, the proposals are quite divergent in their suggested remedies. You are aiming at self-government and I think our role is to assist you in that regard. Now you represent a large group of people in Ontario. Some of the other people did as well, and they argued for a place at the table with the first ministers, for example.

What I am wondering about is how far down the line are we from a situation where we could come up with a formula Canada-wide? One of the other ingredients with some of the other groups in all of this that is not present in your brief is the fact of nationhood. They really treat the federal government as the one they wish to discuss these problems with finally.

There are some Ontario problems that can be sorted out, but in the final analysis, Ontario is not a sovereign state and the provincial premiers, the Prime Minister of the country and whoever represents these other groups, are going to have to come to a table and come to some sort of an agreement constitutionally. I was getting the impression from a couple of the other groups, at least, that it is a long, involved process, and I agree with you that there has to be some sort of a regular, continuous discussion taking place, as was the case between 1982 and 1987.

Assuming that is reactivated, what do you see as the time frame and whom do you see representing people Canada-wide, that kind of thing?

**Mr. Recollet:** You mentioned you heard from other groups in Ontario. I assume you are talking

about the aboriginal people who are legislated under section 91.24. Maybe 99.9 per cent of them are on a reserve.

**Mr. Elliot:** Yes.

**Mr. Recollet:** Our people, the constituent base which we represent, live off-reserve. We do not have any federal legislation at this point in time. The only recognition we have is in the Canadian Constitution, section 35, where it does recognize aboriginal peoples as Indian, Inuit and Metis. But I know when you see that particular clause you figure: "The Metis and the Inuit are not governed by federal legislation. They should have the same rights as our brothers and sisters living on reserves." Well, we do not.

For example, the Indians have land bases, the Inuit have land bases, some form of self-government on a reserve. We do not have that. Our constituent base is still landless, but our birthright is what gives us that special relationship to the land in this province. We should never have relinquished unless it was done with undue force.

As far as initiating the process, I would like to see the process started tomorrow if there was the dedication from the premiers, the Prime Minister and the territorial representatives. I think the process is there. If the political will is there, we can initiate it and come to a conclusion. This problem has not been around for two years; it has been here for 200 to 300 years, before 1763 and before 1867. The assimilation process of aboriginal people has been on the minds of Europeans who came to Canada in the early days and, I think, in 1969 with the white paper trying to involve or eliminate some of the reserve systems.

The ministers and the officials over the five-year political process knew what the aboriginal people want, but I think our problem is to get that political agreement, to sit down, as somebody mentioned, to discuss something in camera here. Sit down and we will start drafting up the context of an amendment to the Canadian Constitution and the right to have self-government within the Canadian federation, which I personally feel, if I were the Premier, I would not have any problem dealing with in Ontario. I think the process should be started as soon as possible, the second round on reform, even before we entertain the Meech Lake accord.

Our rights as aboriginal peoples, the first inhabitants of this province and right across Canada, have been tarnished greatly and until we get back to that second round of constitutional reform, I think we are still going to be at a loss.

**Mr. Reid:** The Ontario Metis and Aboriginal Association has endorsed a proposal by the Native Council of Canada, which was jointly written with the Inuit Committee on National Issues, which proposes a new process for reviving aboriginal constitutional reform. It proposed a two-track process of officials' meetings and ministerial level meetings. The process is actually very similar to the one that was used successfully to reach the Meech Lake accord. It was actually discussed with federal officials at a meeting about six months ago, and they responded favourably to it.

Ontario has been advised of the position as well but has not responded yet. The aboriginal summit, the four aboriginal groups, jointly wrote to Prime Minister Mulroney about three weeks ago, in early February, setting out five points similar to Quebec's five points—similar simply in the sense that there are five points—which should be addressed in an aboriginal constitutional amendment and proposing that the process be revived. But again, we have not received any response yet.

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**Mr. Chairman:** Could you send a copy of that to the committee?

**Mr. Reid:** Sure.

**Mr. Chairman:** That would be helpful.

**Mr. Elliot:** I have a supplementary. I am still not quite clear in my mind whether you feel comfortable in these preliminary negotiations being with the government of Ontario as opposed to negotiating for constitutional amendments with the federal government.

**Mr. Reid:** We have taken the position that all of this is without prejudice to our position that the federal government has overriding responsibility for all aboriginal peoples. It is our position that class 24 of section 91 includes all aboriginal peoples, notwithstanding the fact that the federal government historically has taken a position, and still takes a position, that it is responsible only for status Indians and Inuit because of one court decision back in the 1930s.

Our participation in self-government discussions with the province is from the point of view of the simple fact that we are looking at several areas of jurisdiction that are currently matters of provincial jurisdiction. We cannot discuss it in a vacuum; we have to discuss these with the province. But it is without prejudice to our position that the federal government is the one responsible for aboriginal issues, since our treaties were made with the federal crown.



**Mr. Elliot:** Excellent. You have helped a lot.

**Mrs. Fawcett:** Mr. Chairman, could I have a supplementary on that?

**Mr. Chairman:** Yes.

**Mrs. Fawcett:** Are there problems with getting this sort of national consensus and national unity among the aboriginal peoples? Are there any problems financially or otherwise?

**Mr. Recollet:** It is pretty hard to speak for the national organizations—namely, the Native Council of Canada, the Metis National Council, the Inuit Committee on National Issues and some of the first nations—but as Mr. Reid has mentioned, we have received correspondence, a letter co-signed by four national leaders addressed to Brian Mulroney, calling for the initiation of a second round of constitutional reform. When the four national leaders put their John Henry to a document to the Prime Minister, I think that would be a sign of unity and solidarity in initiating some sort of process related to the right to have self-government entrenched in the Canadian Constitution by an amendment.

Again it comes back to whether there is willingness by the Prime Minister of this country. The response that the NCC received when we were in Ottawa last week was that he referred it to his Minister of Justice, Ray Hnatyshyn. Ordinarily, when you get four national leaders representing all the aboriginal peoples right across Canada and he has to refer it down to his Minister of Justice, there is definitely something wrong. Is he prepared to enter seriously into constitutional negotiations again with all aboriginal groups of Canada or is he just going to start passing the buck to his Minister of Justice? That is where our problem is, not only with Ontario but with our national body, the Native Council of Canada.

He could have taken the bull by the horns and said in his letter of May 1: "Ray Hnatyshyn, David Crombie and William McKnight will sit down with you, along with myself. I will chair the meeting with the four national groups and we will initiate a process. We will talk about the process and we will seriously ensure that we do get something going as far as an amendment is concerned." If I have to start a whole round of negotiations getting the officials and the ministers involved, it is very lengthy and costly process, but there has to be that commitment of the leadership at the federal level as well as the provinces and territories.

**Mr. Allen:** I am pleased that the Ontario Metis and Aboriginal Association has come before us

and that Mr. Recollet has presented a rather comprehensive brief for us on the whole question of aboriginal amendment rights. I must say I want to compliment you for bringing forth a proposal which I think is eminently workable with respect to the companion amendment concept. It appeals to me for more than one reason.

I must say I am not particularly in favour of writing constitutional agendas into the Constitution. I think that, on the one hand, while it is true that native peoples and the territories were the two definable groups that lost in the leap from the Constitution Act, 1982, to the Meech Lake accord, because items that were in fact written down and commitments that were made and were cast in stone, virtually, have been lifted out of the constitutional documents and not replaced. But the item that pertained to yourselves was essentially saying that something should be on the agenda.

To my way of thinking, that is not a particularly appropriate content for a constitution, which ought to be defining specifically what the rights are and what the relationships between the parties are who are coming together to work together in this nation. That, of course, is where we want to get the aboriginal rights question to in the reasonably near future. So I am delighted with the concept of a companion amendment and I think we should certainly put a bit of force behind forwarding that idea.

But you are the first group who have come and used the language for us "unique aboriginal amendment formula." I must say that, in hearing you run a lot of numbers by me there and all those sections of the Constitution Acts, 1982 and 1867 and so on, I was not left with a very clear sense as to what precisely the unique aboriginal amending formula was that you were referring to and what specific clause enshrines it. Was it the formula of seven provinces and 50 per cent of the population? What was the formula that you identify as being the unique aboriginal amending formula?

**Mr. Recollet:** I think that refers to section 38 of the Canadian Constitution, part V.

**Mr. Allen:** Section 38?

**Mr. Reid:** What we mean by "unique" is the fact that there is not simply one section that can be used for amending the Constitution on aboriginal issues. It simply depends on the subject matter. If we are going to amend section 35 to further define what aboriginal and treaty rights are entrenched in the Constitution, then we are talking about the general amending formula. But again, if we were talking about something

within the subject matter of sections 41, 42, 43, 44 or 45, those procedures could be used.

**Mr. Allen:** If it had to do with alteration of boundaries, if it had to do with federal powers, if it had to do with Lieutenant Governors, provinces, things like that.

**Mr. Reid:** Right. There are matters within those areas, for example, that are affected by the Meech Lake accord as well. It is not simply a matter of section 38 not being affected, so we are all right. What we are saying is that there are other areas. We could have used these other sections in the past for constitutional amendments if the issue came within one of those sections, but that opportunity will probably be lost now.

**Mr. Allen:** So then there was not a single, unique aboriginal amending formula.

**Mr. Reid:** It would be the whole package.

**Mr. Allen:** OK. In other words, you are talking about the way in which the package of amending options could be utilized—

**Mr. Reid:** Right. It includes the process.

**Mr. Allen:** —by the aboriginal peoples in order to forward their claims with respect to one subject matter or another, and that, of course, would bounce around among different clauses here.

**Mr. Reid:** Right. Part II also, of course, required—I think it maybe goes without saying that this is unique again—that when amendments affecting aboriginal peoples were discussed, the aboriginal leadership would be invited to participate. Again, that process does not exist any more; it died in April of last year. The companion resolution?? I partially addresses that problem and would revive that part of the aboriginal amending formula.

**Mr. Allen:** Yes, but the precedent still exists because it was done, and that is good; but, as you say, there is no reading which tells us legally that there is any obligation to continue it.

But the question did come up yesterday with respect to whether aboriginal self-government was normally considered to fall under the unanimity principle as affecting federal institutions or whether it would come under some other amending formula. What is your sense of that?

**Mr. Reid:** An amendment simply to define self-government as an aboriginal right would come under section 38, we think, but we do not know.

**Mr. Allen:** Section 38. You are bouncing me around again. It comes under which—

**Mr. Reid:** Section 38 is the general amending formula.

**Mr. Allen:** Yes. In other words, not under the unanimity principle.

**Mr. Reid:** If, for example, an amendment on self-government sought to address class 24 of section 91, which is simply the part of the British North America Act that gives the federal government responsibility for Indians and lands reserved for Indians, if we sought to address that, it would involve Senate powers and obviously then, under Meech Lake, we would be dealing with the unanimity rule.

**Mr. Allen:** OK, that is fine. Thank you.

**Mr. Chairman:** I want to thank you again for coming. In particular, if you could send some of those drafts to which you referred, as well as that process item—I believe the clerk left you our address—they would be very helpful. I think we really do want to sit down and reflect upon a number of thoughts you have put out here. Thank you very much for setting out not only the concerns but, as I said before, also some routes that we could follow to get resolution of some of these.

**Mr. Recollet:** As I have mentioned, OMAA supports the Senate committee in making that recommendation on the issue of the distinct society and the recommendation in relation to treaties and in relation to the northerners, but at the same time we do require the second round of constitutional reform for aboriginal peoples. We even go as far as saying let us resolve that issue before we proceed with Meech Lake because it is the people at the grass-roots or community level who are going to continue to suffer.

If that agreement is signed, who is to say they are going to start negotiating or dealing with the aboriginal peoples not only of this province, but also across Canada? I think we are all going to be victims of society again. The main lawmakers or decision-makers of this country, who are non-native, will be holding us as prisoners for ransom in our own provinces and communities, and only the future will determine the fate of Canada and the province of Ontario.

**Mr. Chairman:** In looking at our schedule, I have asked the clerk if she would speak with Mr. Latrémouille. I apologize, sir, but I understand it would be agreeable to you to come at two o'clock. I think probably everybody needs a bit of food and sustenance. We want to be sure to give you a fair hearing. With that being said, I will adjourn our proceedings until two o'clock this afternoon.

The committee recessed at 12:23 p.m.



## AFTERNOON SITTING

The committee resumed at 2:03 p.m. in committee room 1.

**Mr. Chairman:** Good afternoon, ladies and gentlemen. We will begin our proceedings as people grab a coffee. I will call upon Claude Latrémouille to come forward. Again, if I can apologize, Mr. Latrémouille, we were not able to hear you this morning. We very much appreciate your being able to wait until the beginning of this afternoon, at which time you will find everyone, having had something to eat, will be the fresher for the experience.

We are very glad you came. We have copies of your presentation, so perhaps we will simply begin. If you would like to make your presentation, we will follow up with questions.

## CLAUDE LATRÉMOUILLE

**Mr. Latrémouille:** Maybe I should introduce myself a little. Even though I am a private citizen, some members may want to know where I come from.

I consider myself to be a student of the Constitution. I have been so since the age of about 17 years. I am considerably less young today, but it is a subject which has retained my attention for quite some time. Also, I am a Quebecker, not only because I was born in Quebec but also because, prior to December 1791, where we are standing now used to be the province of Quebec. Sometimes many people forget that.

I wonder if it might be appropriate, Mr. Chairman, since my written submissions are rather short, if the members of the committee might be allowed a few moments to have a look at them, and then I might summarize them in a narrow form.

**Mr. Chairman:** If you would like perhaps for the record, because there is a full Hansard, I might suggest that you read it into the record. That then also gives us a chance to reflect on it.

**Mr. Latrémouille:** I shall do so. I wish to point out to the committee a serious error of fact in the document under consideration, the draft resolution. The error is to be found on page 6 of the English version of the document. It is in the preamble, the first paragraph of which says, among other things, "following an agreement between Canada and all the provinces except Quebec."

Although it is widely believed that such is the case, the committee will note that no province gave its consent to the Constitution Act, 1982. It is a fact, however, that nine of the 11 first ministers apposed without reservation their signature to a document dated November 5, 1981, at Ottawa. The first minister for Manitoba signed the document "subject to approval of section 3(c) by the Legislative Assembly of Manitoba."

It is well known that an 11th signature is missing from the document, that of the first minister of Quebec.

Constitutionally speaking, however, the matter does not end there. For a province to be bound by the signature of its first minister, its own Legislature must be seized of the matter and its consent formally obtained before one may say that a province has agreed. In 1981, only Messrs. Davis, Buchanan, Hatfield, Lyon, Bennett, MacLean, Blakeney, Lougheed and Peckford agreed. On the federal scene, matters were dealt with properly since Mr. Trudeau submitted the document he had signed to the ratification of the House of Commons and of the Senate of Canada.

In Quebec, the National Assembly was indeed seized of the matter and at a special session commenced on November 30, 1981, debated it, as is the custom in a free and democratic society, and finally voted the next day on a motion stating the reasons for its refusal to accept the November 5 agreement. Quebec was then, and has always been, the only province to have been consulted on the Constitution Act, 1982, and it rejected it. In Ontario, as in all other provinces, the November 5 agreement was never submitted to the Legislature. As a result, Ontario's consent and that of all other provinces was never given to it.

On the judicial front, a full bench of the Supreme Court of Canada unanimously ruled in the anti-inflation reference, which was reported in 1976, 2 SCR, starting at page 373, that the government of Ontario cannot bind the province of Ontario unless the agreement it makes with the government of Canada is approved by the Legislature.

Applying this principle to the 1981 constitutional tractations, one is brought to conclude that the agreement referred to in the first paragraph of the preamble to the resolution to authorize an amendment to the Constitution of Canada was not made between Canada and all the provinces

except Quebec, but between the government of Canada and the governments of all the provinces except Quebec.

The committee is therefore urged to recommend to the Legislature an amendment to the first paragraph of the preamble so that its wording be in keeping with the nature of the agreement to which it refers. The amendment could read as follows:

"Whereas the Constitution Act, 1982, came into force on April 17, 1982, following an agreement between Canada and the governments of all the provinces except Quebec," etc.

**1410**

That concludes my written submission. I might want to add that since the recommendation I am making to the committee does not change the content of the draft resolution, that is its substantive clauses, it might be more politically feasible or acceptable to have the preamble amended without raising any big cries in other legislatures and even in Ottawa.

The second reason, of course, is that if the document contains an error of fact, which I believe it does, it is more serious than if such an error were part of a bill that the Legislature passed because that can be changed at any time. From a historical point of view when people will read those documents in the future, for accuracy, it seems to me that one should not allow an error of fact to creep into a preamble of a constitutional resolution.

That is why I feel strongly about that. Even though I have many feelings about the rest of the Meech Lake accord, since nobody, I believe, to my knowledge, noted that particular point before you so far, I felt that it was necessary for me to raise it. That is basically my presentation.

**Mr. Chairman:** You note the anti-inflation reference and you have done that in simple terms, now could you just refresh us on the meaning of that? Why was that an important point?

**Mr. Latrémouille:** First of all, maybe to summarize the case itself, the Supreme Court of Canada was concerned with two questions. One was the big case, which was whether the federal government had the jurisdiction to enact what they did enact in 1975 concerning anti-inflation measures. I say that was the big case because that is the one which made the headlines and was talked about most.

But there was what I would call the small case, which related specifically to Ontario. The question which was asked of the court then was whether the government of Ontario, through the signature of its minister—I believe it was Mr.

Bennett at the time—through an order in council had the power to bind the province and therefore bind the citizens of the province, and in particular in that case it was the civil servants and the teachers of Ontario who were brought under the umbrella of the federal anti-inflation measures through an order in council.

I believe it was Aubrey Golden of Toronto who argued the case in front of the Supreme Court of Canada. He was successful; and his argument was Mr. Davis or Mr. Bennett, or even the cabinet, does not have the constitutional authority to bind the citizens of the province, and therefore the civil servants or the teachers, without coming first before the Legislature to have their agreement ratified by the Legislature.

The Supreme Court, even though it was divided on the big case, that is whether the feds had the right to do it or not, on that case the nine judges were unanimous. They all concluded—and I believe the main reasons were written by Chief Justice Laskin—that the Ontario government did not have the power to bind the citizens of Ontario, and therefore the teachers and the civil servants, just by order in council. They had to come before the Legislature.

The reason this case is somewhat relevant to the present draft resolution is that it seems to show the principle that whatever Mr. Davis did or whatever Mr. Peterson does now, although now he is forced by statute to come here to have it ratified, in 1981 there was no such statutory requirement. But to say in the preamble today that the provinces were consulted, one would have to say they were consulted through their Legislature and they were not. That is why I raise the anti-inflation reference.

**Mr. Chairman:** In that regard, in terms of the 1981 or 1982 agreement, what significance would that point make to the legality of that agreement? Was there a vote in the Ontario Legislature? I do not believe so, but I honestly do not remember.

**Mr. Latrémouille:** No, there was not. As a matter of fact, there was one witness before you a few weeks ago who said that the Legislature had decided in 1982 about the charter, etc. I believe it was Mr. Finkelstein.

**Mr. Chairman:** Yes.

**Mr. Latrémouille:** He was wrong on that point. The legislatures were never consulted in 1981 or 1982. There was no vote at all.

**Mr. Chairman:** Is it your feeling that if somebody were to take that to court, there is a case?



**Mr. Latrémouille:** In terms of court, I am not sure, because there are two points to consider: whether we are dealing with conventions and whether we are dealing with law. In terms of constitutional conventions, because no province was consulted, therefore, the Canada Act 1982 is unconstitutional in the conventional sense. As far as the legal sense is concerned, whether a court would find that, even though the provinces were not consulted, the mere fact of Westminster, the British Parliament, having passed the act: is that sufficient; is that constitutional in the legal sense?

That is slightly more doubtful because they may say: "Well, still legally, it was done. It does not matter whether the provinces were consulted. Even though, in terms of constitutional convention, that was not appropriate, legally it was."

My purpose today is not to try to pass judgement on the legality or not of what happened in 1981 but to make sure that the statement of fact contained in the 1987 resolution reflects the state of facts that occurred then.

**Mr. Chairman:** Can I ask one question which, instead of looking to the past, looks to the future? This obviously would not work in this case with the Meech Lake accord, because of 1982; it must come to the Legislature and simply would have no validity unless it did so, but that is because it is spelled out.

**Mr. Latrémouille:** Right. Of course, it is the legitimacy of the whole thing which is the worst situation because in terms of the legitimacy, what we have is the Parliament of the United Kingdom passing an act telling the Legislature of Ontario, among others, that it has such-and-such powers or that it does not have such-and-such powers, without ever asking it. That is without precedent.

In the past, the powers of the legislatures were never affected to that degree when they passed constitutional amendments. So that is the significance of it. But all I am concerned with now is that the facts of what happened in 1981-82 not be distorted by the text of what has been agreed to in 1987.

I could say, whether you change it or not, it does not change the fact that the legislatures were not consulted in 1981, but my personal satisfaction in reading a constitutional document is that maybe we should have the facts straight. Even if we do not agree on the substance of the resolution itself, at least let us have the facts straight.

**Mr. Chairman:** I think that is a very clear point. Do you have a query, Mr. Allen?

**Mr. Allen:** No, but I do think the facts and having them straight are quite material matters

since there could conceivably be a matter of power and authority that derives obviously from words in these documents. Clearly, if this were to be the accepted interpretation, in practice it would certainly give more authority to that document than apparently it does have.

It had not really seized me as to how significant that might well have been in practice, because it would be a significant departure from even what happened, I believe, in 1867. Did not all the legislatures consider the resolutions from Charlottetown and Quebec?

**Mr. Latrémouille:** In 1867 there was one legislature, as far as Canada was concerned, right? I do not know what they did in New Brunswick and Nova Scotia, but these were the only three colonies at the time that were involved in the initial creation of the British North America Act; although the others were mentioned, I believe in 146 or something. The others were mentioned as potential entrants to the union. So I do not really know if the three legislative assemblies of Canada, New Brunswick and Nova Scotia did, in fact, consider all the resolutions of Charlottetown and Quebec.

**Mr. Allen:** The Quebec conference.

**Mr. Latrémouille:** The Quebec conference, but then there was the London conference afterwards where a few more sections of the act were added. So, in fact, we could say that the legislature did not consent.

**Mr. Allen:** Not to the final text, that is right.

**Mr. Latrémouille:** But in those days, though, the question was not as crucial because nobody had the power to amend the BNA Act because the BNA Act did not exist.

**Mr. Allen:** Of course.

**Mr. Chairman:** Lawyers will always find ways around those things, I am sure.

**Mr. Latrémouille:** The best argument against what I am trying to say is that because, in the past, the legislatures did not always agree to whatever changes were made, therefore there was no requirement; but I am not arguing that there was a requirement, I am arguing that it did not happen.

**Mr. Chairman:** I want to thank you for bringing forward what is definitely a novel point that I do not think anyone has mentioned. The reference to the anti-inflation case is a most interesting one.

**Mr. Allen:** It occurs to me that, obviously, Mr. Latrémouille has reflected a good deal on constitutional matters. I wonder if there are any

other observations he would care to make while he is here, having come this distance, with respect to the more constitutional issues involved in the accord.

1420

**Mr. Latrémouille:** Of course, I am burning to give my opinion on the famous section. That is the question of whether section 16 overrides, section--

**Mr. Allen:** Well, do it, please.

**Mr. Latrémouille:** I am so happy to have witnessed your first week of hearings because it was a delight to hear the ladies and gentlemen that appeared before you on the first week of your hearings. Also, it was the presentation by, among others, Mr. Maldoff, who made a very clear case about the fact that section 2 does, in fact, override the charter and almost everything else in the Constitution itself, with the exception of the subsections that are mentioned in section 16.

The only thing I might want to add to his presentation, which was quite complete, is that it seems that few people mentioned the most obvious: whenever there is an enactment which follows another one on the same subject, automatically it takes precedence. That is what an amendment is. Nobody, to my knowledge, mentioned that yet. They mentioned the principle of *inclusio* and *exclusio*: the fact that they mentioned a few things, therefore it means that the others are excluded. They mention the fact that section 2 is part of the Constitution, it is not part of the charter, therefore section 28 does not apply because section 28 talks about everything in the charter, not everything in the Constitution. So, basically, I would say that I have absolutely no doubt that section 2, as drafted, would take precedence over the charter itself and over whatever else would be in the Constitution except le *partage des pouvoirs*, the sharing of powers, between the feds and the provinces because that is specifically mentioned in section 2.

So there is no doubt in my mind that it does override that, and that is probably why Quebec agreed to it. I do not quite see the game that was played at the beginning that it was just an interpretative clause. Well it is an interpretative clause, but it is also part of the Constitution, and therefore it has some substance to it.

**Mr. Allen:** Do you have any observation on the question as to whether the section 28 of the Charter dealing with male-female equality rights is adversely affected by section 16?

**Mr. Latrémouille:** It is not adversely affected in that way. It is rather that it applies to the entire charter; and section 2 has nothing to do with the charter, it has to do with the entire Constitution. I am talking about the draft, the future section 2 of the Constitution Act, 1867.

**Mr. Allen:** No, I was referring to section 28.

**Mr. Latrémouille:** Right.

**Mr. Allen:** Male-female.

**Mr. Latrémouille:** But that section refers, I think it says something about the entire charter, nothing in this charter—I may want to refer to it.

**Mr. Allen:** Yes; notwithstanding anything else.

**Mr. Latrémouille:** In the charter.

**Mr. Allen:** Yes.

**Mr. Latrémouille:** So if it is notwithstanding anything else in the charter, then anything which is outside the charter has nothing to do with section 28. I believe Mr. Maldoff mentioned that.

I believe your best guide so far are the statements made by Mr. Maldoff because he was quite comprehensive and quite accurate in almost everything he said.

**Mr. Allen:** OK.

**Mr. Chairman:** Thank you very much for bringing your presentation to us, as well as your other observations. We appreciate it very much. Again, I apologize for having you wait longer than you would have expected to make your presentation.

**Mr. Latrémouille:** It is OK, Mr. Chairman. I thank the committee.

**Mr. Chairman:** OK, thank you very much. If I might now call upon the representatives of the Disabled Women's Network, Dawn; Elizabeth Stimpson and Sharon Wood. I wonder if you might just sit on either of these chairs. It's just a little easier—

Thank you very much for coming and joining us this afternoon. I apologize for the delay but I hope it wasn't too long. We have before us a copy of your submission. If you would like to take us through it, we will follow up with questions.

**Mr. Allen:** What was the exhibit number?

**Clerk of the Committee:** Number 167.

#### DISABLED WOMEN'S NETWORK OF TORONTO

**Ms. Stimpson:** Mr Chairman and members of the committee, I beg the committee's indulgence. I am on several drugs which have the effect of slurring my speech so if I say something



very bizarre or off the wall, please excuse me. This brief is presented by the Disabled Women's Network of Toronto. We are the voice of the disabled women of Metropolitan Toronto. This brief will deal with the repercussions that will be felt by all disabled women should the Meech Lake accord ever come into law. It deals with the lack of understanding given to social justice and equality by the Premier (Mr. Peterson) of this province who has betrayed us doubly—as disabled women and as able women. The Meech Lake accord fails to entrench women's rights and also destroys the rights of our sisters who are black, native, ethnic and those who have different sexual orientation.

If we could believe that the Charter of Rights and Freedoms which is enshrined in the Constitution would take precedence over the accord, then women would not be so twitchy.

The patronizing attitude of the men who blithely signed this accord obviously without thinking about it very carefully or consulting their constituents shows how much the federal government was willing to sign over its powers and just how willing the provinces were who were greedy enough to snatch the power up.

Ivan Illich has made the statement that there is a correlation between what we think and what we write. Therefore, the language we write in has a very close relationship to what we think.

One of the great Quebec women and one of my personal heroines, Madame Solange Chaput-Rolland, has in somewhat maudlin terms written about the Meech Lake accord thus:

**Ms. Wood:** "Inside Quebec, seven years ago, we decided that Canada was our country. We have yet to find out whether our loyalty was well placed. Frankly, in 1982 I wondered if the agonies, the pains, the quarrels, the bitterness following the referendum had been necessary. We voted for Canada; Canada through its central government totally absorbed in its will to patriate the British North America Act of 1867, cared very little about those who had openly stated their will to remain linked to this country. Promises and dreams were shattered; but not a single Québécois will want to go through such emotions again. You English-speaking Canadians have asked during years; what does Quebec want? Now you know. It has been described in five proposals not written by constitutionalists, jurists or nationalists, but by men duly elected by 'we the people.'" From the report of the joint committee.

**Ms. Stimpson:** I disagree with Madame Chaput-Rolland and further, the languages of

English and French were enshrined in the Constitution of 1862 equally. The Meech Lake accord makes no pretence of being a truly Canadian document. Instead, it is a totally Tory document. The bias shrieks out in the following passages:

**Ms. Wood:** From section 9 of the accord amending section 41 of the Constitution Act, 1982:

"An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

"(a) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

"(b) the powers of the Senate and the method of selecting Senators;

"(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of senators;

"(d) the right of a province to a number of members in the House of Commons not less than the number of senators by which the province was entitled to be represented on April 17, 1982;

"(e) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

"(f) subject to section 43, the use of the English or the French language;

"(g) the Supreme Court of Canada;" and on and on.

From section 101A, on the Supreme Court of Canada:

"(1) The court existing under the name of the Supreme Court of Canada is hereby continued as the general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a superior court of record.

"(2) The Supreme Court of Canada shall consist of a chief justice to be called the Chief Justice of Canada and eight other judges, who shall be appointed by the Governor General in Council by letters patent under the Great Seal."

#### 1430

101B (1) states: "Any person may be appointed a judge of the Supreme Court of Canada who, after having been admitted to the bar of any province or territory, has, for a total of at least 10 years, been a judge of any court in Canada or a member of the bar of any province or territory.

"(2) At least three judges of the Supreme Court of Canada shall be appointed from among persons who, after having been admitted to the bar of Quebec, have, for a total of at least 10 years, been judges of any court of Quebec or of any court established by the Parliament of Canada, or members of the bar of Quebec."

**Ms. Stimpson:** This convoluted prose betrays a subterfuge behind the tortured ideas of those who wrote these words. Once can only wonder at the Premiers who are not Tories signing such a document. The Premier of Ontario, David Peterson, promised the citizens of this province hearings, but after he had become secured after the September election, he had the unmitigated gall to make the statement that he had no intention of unravelling the Meech Lake accord. Is he in his Marie Antoinette phase just sloughing us off with a wave of his hand saying, "Let them have hearings"? Perhaps he should have consulted his constituents before he signed this, as it is our constitutional and democratic right to have our views seen and heard.

Pierre Teilhard de Chardin has said the following:

**Ms. Wood:** "The social aspirations of man cannot attain full originality and full value except in a society which respects man's personal integrity."

**Ms. Stimpson:** Did the Prime Minister and the others sign over democracy like they signed over everything else, like women's rights?

The Meech Lake accord has several components to which I would like to speak.

1. The disenfranchisement of women's rights: women's rights are not enshrined in this accord. Attributed to the Prime Minister is the rather trite statement that we do not have to worry out pretty little heads about them. Is it really above our heads or it is behind our backs? Trust them? Trust is an anomaly with this government, as it is with all the first ministers of this country. Can we believe and/or respect a man who would say that if you are against the Meech Lake accord, you are against Quebec?

2. The denial of rights of our sisters who are aboriginal, black, ethnic, elderly and disabled: the marginalized groups are not found in this accord. The most vulnerable people in our society are both the disabled and the elderly. Perhaps you are familiar with the report by Dr. Carruthers on the overuse of drugs and the drugging of elderly people under this very system.

The vulnerable people of our society are treated badly by all the bureaucracies from health

care to welfare. Disabled women have a very difficult time organizing (a) because of our handicaps, visible and nonvisible, which grind us down; and (b) lack of funds. Disabled women have to spend long, tiring hours meeting, discussing, travelling and begging for assistance. I imagine this would be also true for other marginalized groups. Why is it that the government of this country feels that it can really treat a very large segment of our society with complete contempt?

3. The transfer payments, rollbacks or shared-cost programs, whichever you want to call them, which give moneys to the provinces for such things as welfare, health and public works: these are the most practical and frightening aspects of the accord. The following passage will show my concerns:

**Ms. Wood:** "106A(1) The government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the government of Canada after the coming into force of this section in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives."

**Ms. Stimpson:** Professor A. W. Johnson, who is not some Martian who just dropped down from outer space but a man who has been in this area since its very inception, has been able to clarify the gobbledegook from the accord with the following statement:

**Ms. Wood:** "The only requirement the opting-out province would have to meet is that it carry on a program which is compatible with, which is to say capable of existing alongside, the national objectives the government of Canada was seeking to achieve by its national program..."

**Ms. Stimpson:** In the field of health care, there is nothing guaranteed that says a province could not opt out or roll back its health care. We have had a very frightening example in recent history where three or four provinces abrogated health care to themselves and refused women access equally to health care. It is this precise contempt for the law that makes women very frightened about this.

For disabled women, the horror show is equally terrible. We need to use welfare for our drugs. We also need the health care system, because we have family physicians, we have specialists and we need to use hospitals. Will we be getting all this if Meech Lake becomes the law of the land? We also need to use the health care system for such things as assistive devices like



wheelchairs and crutches, and the welfare system for medical equipment such as compressors for asthma, etc. All things such as health care, welfare, day care and education impact on the lives of disabled women. Nothing in the accord guarantees us anything.

4. The support we give to Quebec: we are here to fly in the face of the Prime Minister and say we are against the Meech Lake accord and for Quebec as a distinct society. In 1980, Quebec said yes to Canada, and as far as we know, Quebec has never been out of Confederation. We stand with our disabled sisters in Quebec, both francophone and anglophone.

5. The destruction of our country: Canada was not brought into Confederation easily or willingly. It took very strong, highly imaginative leadership and, at times, compromise and chicanery. This Confederation was founded on a very strong federal government and provinces which had their own powers and rights. But this whole system was shredded in a most cavalier manner in June 1987 behind closed doors. One can only speculate why this was done. The conspiracy theory might read that smaller entities are more easily picked off by the American vulture—I mean eagle.

#### 1440

One might ask why the Prime Minister felt it necessary to divest the federal government of all its powers, investing the provinces with all powers, and one with disproportionate rights.

Women traditionally have had a harder time to make their voices heard in anything concerning politics or government, but disabled women have five times more difficulty. Under the accord, we will no longer have to lobby just to a federal body; we will have to lobby in 10 provinces. The travesty called the Meech Lake accord writes out so-called law and justice for everyone who is not heterosexual, male, white and socially advantaged in our society.

Women are not some pipsqueak minority which can be overlooked any more. We make up over half of this country and we demand that our rights be treated equal with our numbers.

We have been denied our constitutional right to hear what is in the Meech Lake accord and to have our voices heard in open discussion. Governments seem to feel it is their right to bring out in the summer what has been called the "great summer exposure," hearings and reports of commissions, so that we had in the summer of 1987 the hearings of the special joint committee of the Senate and the House of Commons on the Meech Lake accord, when no one was around

and it was hard for groups to get themselves together, meet with their groups, document, research, make a brief and rush off to Ottawa to present it. Is this someone's idea of true democracy?

The Premier of this province has to stand for all the people, the aboriginal, the native, the black, the ethnic, the disabled and the elderly. We expect him to stand up for our rights and our rights are not contained in this tawdry, self-congratulatory document called the Meech Lake accord.

**Mr. Chairman:** Thank you very much for your presentation. I would express on behalf of the committee that we are appreciative your organization took the time to put together a brief and come and meet with us. I certainly accept the point you make that whatever difficulties there are for various groups and organizations in coming before a committee such as this, they are much more difficult for an organization that does bring together people with various disabilities. I appreciate the fact you have done that and brought these views to us. Perhaps we can start the questions with Mr. Offer.

**Mr. Offer:** Thank you very much, Mr. Chairman.

**Ms. Stimpson:** Excuse me. Could you tell me who you are? I cannot see you and do not know.

**Mr. Offer:** My name is Steven Offer.

Thank you very much for your brief. One of the things you have spoken about in your brief, and this is merely by way of comment, is that people who come and speak against the accord are somehow put off by some others as being anti-Quebec in some way. By way of comment, through our hearings we have heard a great many people and we still have a number of people to hear in the days and some weeks ahead, some in favour and certainly some against, who raise certain comments and concerns.

With respect to that, in dealing with those who are against the accord, I do not see that anyone on the committee has in any way, shape or form put them aside as being anti-Quebec. I think we have been attempting to understand the concerns and grapple with the concerns because we are going to have to do that in our final report, whatever shape it may take. I do not think anyone in this committee has put that down as anyone being anti-Quebec as opposed to people just having some concerns with a particular document, that they are asking us to meet those concerns. I think that is a pretty legitimate exercise in that respect.

On that point, I would like to talk about one of the concerns you brought forward, and that is

with respect to this whole question of shared-cost programs. It is certainly a concern we have heard in the past. What is recommended in the agreement, of course, is that, one, the federal government can introduce programs in areas of exclusive provincial jurisdiction which was not constitutionally recognized before; and two, because it is in an area of exclusive provincial jurisdiction, the provinces have the ability to opt out.

I know you understand that, but my question is, on that basis, in dealing with this country and in dealing with the very different realities in each province, in principle is it not a pretty good idea that in areas of exclusive jurisdiction where the federal government has chosen to introduce a national program, a province would have the right to take a look at that program and say, "Listen, for this area dealing with disabled women in Ontario, we want to make certain it deals with the particular needs in this province"? We may wish to go along with the federal program, but we also might want to deal with the particular needs in this province. Should that not also be the situation in Alberta, New Brunswick, Prince Edward Island and British Columbia, each dealing with particular needs in the particular province?

My concern is that this section, apart from the concerns you have raised, really does go towards meeting different concerns from different groups such as disabled women. There is that possibility of flexibility now that there really was not in the past. I would like to get your comments with respect to how you are concerned with such a provision.

**Ms. Stimpson:** My concern is that the provinces have shown total contempt for federal initiatives, as I said, in the case of health care and that is what we are worried about. If provinces are showing such contempt, and Meech Lake is not even the law of the land, I suggest they will have a field day when Meech Lake is the law of the land. We cannot always be running to the Supreme Court for everything. I am sorry, but I could not trust any government of any party to respect federal initiatives and not to opt out of everything it feels like. I just do not believe it; I am sorry. I have seen it happen. A month ago, it happened. How can we trust any province? We cannot.

**Mr. Offer:** A month ago, it happened?

**Ms. Stimpson:** Yes.

**Mr. Offer:** I am trying to understand that.

**Ms. Stimpson:** A month ago the Supreme Court brought down the abortion ruling. We had

four provinces that with total contempt for the law, took health care into their own hands and denied women equal access. I am sorry, but I just do not have the confidence you may have. I do not care what party is in power; I just do not have the confidence.

**Mr. Offer:** I understand what you are saying. It is just that I think this particular section gives to the provinces—people have come before us and said, "We are a little concerned with the wording and things of this nature," but it gives to the provinces in areas of exclusive provincial jurisdiction a flexibility to meet particular needs. I hear your concerns and I thank you for your concerns, but I just wanted to tell you somewhat how I see it. I just happen to feel that, in the past, the provinces, of whatever government—it does not really matter—do meet and attempt to meet particular needs, maybe not as fast as others would like it. But the need is always there; I do not know if there is that type of contempt. I thank you anyway for your concern.

1450

**Ms. Stimpson:** Could I just make a statement about your first comment?

**Mr. Offer:** Sure.

**Ms. Stimpson:** I do not think I said that this committee—I thought I said that the Prime Minister had made the statement that if you are against the Meech Lake accord, you are against Quebec. I certainly never thought this committee had said that.

**Mr. Offer:** In response, absolutely; I know. I just wanted to make certain.

**Ms. Stimpson:** No; I understand that this committee would not be here—

**Mr. Offer:** That is fine. Thank you very much.

**Ms. Popkey:** I have an example that shows the differences between provinces on this issue—

**Mr. Chairman:** Can I just ask you for your name?

**Ms. Popkey:** Carol Popkey, and I am with Disabled Women's Network.

To show the difference, because I would think of the federal program as being sort of the basics that they want to initiate within each province, I am a single parent who was in an accident in British Columbia and was on social assistance because I was abandoned with my children when the second child was still an infant. I then intended to go back to school when she was two or three years of age. But I was in an automobile accident and became disabled, and I cannot go to



school full-time or work full-time; I do both part-time.

In the province of British Columbia, dental care was completely covered for my children and me. At one point I had a relapse, and my parents came and moved me from BC to Ontario; so I was living here, first on mother's allowance and then I switched to disability pension. My children's father moved here for a while because I was having such a terrible time recovering, and so the children lived with him for a while. I was on disability pension, and the only dental coverage I had was emergency care, not preventive care, which was just changed this past January. But it was a real shock. There were two years where I had to pay for regular dental checkups.

That is the kind of concern we have: that the federal government is initiating, say, a basic program. If a province wants to improve benefits because we do not get the costs of aids and certain medical prescriptive things covered, that is great; but if the basics are not there, that is where the concern is, that there will be a substandard in certain regions because of this particular option.

**Mr. Allen:** I want to thank Sharon and Elizabeth, and is it Sylvie?

**Ms. Popkey:** Carol.

**Mr. Allen:** Carol. I thank you for coming and representing the Disabled Women's Network before us this afternoon. I must say it is a very eloquent and impassioned document that you have presented before us. In particular, I guess the main message is the sense of disenfranchisement that you feel with regard to the entire process. I think that in many respects you have probably got more reason to feel that than most people, although it is interesting how many people come before us in this committee on this subject and give us that message: that somehow at this date in our history it is very strange that constitution-making should be so much an operation confined to so few people; conducted, apparently, like last-minute labour negotiations, a round-the-clock sort of operation where everybody exhausts himself in an attempt to get some kind of document. That is bound, of course, to produce errors that were not intended; as well as, perhaps, to relieve those who do the exercise of the normal democratic process of popular criticism and input from all of us. I think we certainly hear you loud and clear on that.

The second impression I am getting—and am I correct in this?—is that your principal problem with the accord is that you really do not trust provincial leadership, provincial governments, to respect social programs, health care delivery

systems; that—and I gather you used the example of the Supreme Court—the moment they were off the leash, so to speak, they suddenly began doing things that were, well, to put it mildly, retrogressive with regard to the laws that had stood, let alone what it might have been. Is that your concern, the degree to which it appears to provide more powers to the provinces and, therefore, will undermine social programs? Is that your second big objection?

**Ms. Stimpson:** Yes, absolutely. You see, we have had the example. I am very twitchy about provinces just thumbing their noses at the Supreme Court or the federal government, such as it is; I do not even know whether we are going to have another federal government.

**Mr. Allen:** That is an interesting observation. I do not think anybody has quite struck us with that one up to this point.

**Ms. Stimpson:** I think the federal government will only be doling out the money and orchestrating some kind of tenuous foreign policy.

**Mr. Allen:** A sort of a national cashier.

**Ms. Stimpson:** Right; exactly.

**Mr. Allen:** Yes. I certainly hear what you are saying. What kind of relationships do you feel ought to prevail between provinces and the federal government with respect to shared-cost programming or national programs, that are in particular the ones you depend on?

**Ms. Stimpson:** The problem is that I do not think the federal government has either the will or the number of bureaucrats to monitor in every province these health care programs, welfare programs or any other kind of programs. I think the federal government should keep a very strong hand on any money that goes out, and should tell the provinces, "This is what it is for and for nothing else." If it has to go to the Supreme Court, then it must follow what the Supreme Court says unequivocally.

**Mr. Allen:** OK; I will just move to another question. I was not quite sure what you were saying you disagreed with in M. Solange Chaput-Rolland's comment, whether it was the content of the five points that were the basis of the Quebec request, or whether it was just simply the language she couched it in, which you said was maudlin. I am not quite sure that I got the message there.

**Ms. Stimpson:** No; she made the statement that the federal government was totally absorbed with repatriating the Constitution. I disagreed with her somewhat in that because I felt that many, many people in Quebec deplored the links

with Britain and were very happy to have that Constitution brought home. That is why I disagreed with her on that point.

**Mr. Allen:** Oh, I see. So you were not raising a question about the legitimacy of the five points that Quebec finally put forward as a basis for some new discussion and conclusion of the matter?

**Ms. Stimpson:** No, not necessarily.

**Mr. Allen:** OK; thank you very much. We appreciate your coming.

**Mr. Harris:** I just have one question. I, too, appreciated the brief and the presentation that you made. I want to ask something so that I may understand a little bit of where you are coming from. You obviously have a very strong distrust of the provinces. Maybe this will seem like a silly question, but would we have better government in Canada if we just did away with provincial governments?

**Ms. Stimpson:** No, no; I do not have anything against the provinces. I think they have been given too much power and we would not have any federal government any more. That is how I read it. That is how I read it the first minute I heard about the accord.

**Mr. Harris:** What if we did away with all of the provincial governments; would that satisfy you that you would have insured national standards all across the province?

**Ms. Stimpson:** No.

**Mr. Harris:** I ask the question because all the areas that you are very supportive of the federal government in are not its jurisdiction and, quite frankly, none of its business unless the province allows it to make it its business. So this Constitution tries to deal with that, and national programs have had to try and deal with that. The way we are structured, health care is none of their business.

**Ms. Stimpson:** Yes, but you take the money for it, do you not?

**Mr. Harris:** That is right. That is the power they have. Once you take the money you accept the conditions. This is trying to deal with those powers.

**Ms. Stimpson:** I do not believe the provinces will necessarily follow the provisions that are set.

**Mr. Harris:** Do not get me wrong, I am not proposing that as a silly option. I am not sure you are not right. Maybe if we did not have provincial governments we might get rid of one whole level of bureaucracy and it might be better. I am just asking you if that would take it to one extreme to

guarantee that there would be no interference in what national objectives are.

**1500**

**Ms. Stimpson:** No, I am happy with that. I must admit I appreciated the Confederation which we had previously because I feel that we have had our country changed behind our backs. We did not have anything to say about it. It was done behind closed doors.

**Mr. Harris:** I understand that. I think we share that concern with you.

**Ms. Popkey:** In your question you are actually debating the system of federalism, because the provinces are regional areas that have been federated together to form a country and, next to Russia and China, this is as big as you get. There are always going to be problems with how to disperse the power and have an equality over such an expanse of land and numbers of people. So you are questioning federalism as a system. Your question is bringing that into it.

**Mr. Harris:** Yes. You see, when you give me the example that it is OK for provinces to top up basic programs, you accept that; but if you come from a province that has topped up a basic program and go to another province, all of a sudden the basic from that province is not basic here. It is like dental care.

**Ms. Popkey:** Yes. I have an example. I have a degree from Ontario, and when I tried to go to university in British Columbia I managed to get my Bachelor of Arts in less than two years by going winter-summer, winter-summer, which they do not allow people to do. As you can see, they said I had to do third and fourth year. This is in the same country. I have to do undergraduate work when I am granted a degree from another province. That seems absurd.

**Mr. Harris:** But if we took education away from the provinces and gave it to the federal government, that would create a problem.

**Ms. Popkey:** No, no. I think there should be standards in these areas so that if you are moving from province to province maybe you do want to license people in your public education system, the federation of each province would like to license people, each teacher; but not to recognize a degree from within your own country when foreign students are recognized for their degrees coming from another country, that seems to me rather absurd.

**Mr. Harris:** I agree.

**Ms. Popkey:** It is those situations we are looking at.



**Mr. Harris:** I am not sure you would ever solve it unless you just got rid of the provincial governments.

**Ms. Popkey:** Or the University of British Columbia.

**Mr. Chairman:** I would like to thank you very much for coming this afternoon and presenting your brief to us, and as others have noted for speaking very forcefully on the whole issue of federal involvement in a number of major social and educational programs, which are of particular interest to your organization. We thank you very much for that and for making your presentation.

If I could now call upon the representatives of B'nai Brith Women of Canada. I believe the public affairs chairperson, Hannah Feldman, will introduce the members of the group. If you will please come to the front. If you need more chairs perhaps Mr. Offer would be helpful in that regard.

Does everybody have a chair? We want to thank you very much for joining us this afternoon. I must apologize that we are running a bit behind but we got behind this morning so I am afraid we are going to be behind as we do through the afternoon. We all have a copy of your submission and I will simply turn the mike over to you. Please proceed as you wish and we will follow up with questions upon the completion of your presentation.

#### B'NAI BRITH WOMEN OF CANADA

**Mrs. Feldman:** Thank you very much. First, I would like to present to you my fellow members of the B'nai Brith Women of Canada who have come here today. On the end is Ruth Rose, who is the president of B'nai Brith Women of Canada. Beside me is Enna Pearlston, who is Canadian public affairs chairman of the Toronto council, and my colleague in writing and presenting this position paper.

To my far right is Joan Rumack, who is the president of Toronto council for the B'nai Brith Women of Canada. Beside me is Penny Krowitz, who is our executive director of B'nai Brith Women of Canada. My name is Hannah Feldman. I am the national public affairs chairman for B'nai Brith Women of Canada.

**Mr. Chairman:** Welcome to you all.

**Mrs. Feldman:** Thank you very much; good afternoon.

Mr. Chairman and members of the select committee, this preamble is not part of our formal presentation as it is an intensely personal explanation of what I am doing here today. This

is terra incognita for me and it is a very difficult and taxing moment in my life.

In establishing my credentials before this committee, I would first like to share with you what I am not. I am not a lawyer. I am not a professor. I am not an expert on constitutional law. What I am, however, is infinitely more germane to the events transpiring here today. I am Canadian public affairs chairman of the national board of B'nai Brith Women of Canada. I am a dedicated volunteer belonging to this proud Canadian organization of many volunteers, and we have a keen interest in furthering, as far as it is within our collective abilities, the wellbeing of fellow Canadians.

I am also a business woman, a wife, a mother, a sister, a daughter, with all of the obligations and concerns that are inherent in these roles. I am a concerned Canadian citizen who has quite unaccountably discovered a surprising passion for the vision of how great this country could be and, in so doing, I now find myself presenting this position paper at this time and in this place.

The impression that the democratic process in this country is in peril reaches across all age groups, as is attested to by the fact that my colleague in the drafting of this brief is a young woman who is just as involved and concerned as I with the seeming erosion of our political process. Volunteers such as we, no matter what their titles, do not lightly devote working days, leisure hours and evenings to such an endeavour without being deeply committed on a personal level to bringing our concerns before you today.

There is a malaise in this country stemming from many sources, most having to do with the style of government we see emerging with the introduction of this amendment to the Constitution. The perception of democracy in action is often as important as the reality and we, along with many other Canadians, are being told that our input in this matter is neither being sought nor, when offered, is it to be heeded.

I hope you will believe that our presence here today is not merely an intellectual exercise on our part, but stems from a sincere and deep-seated conviction that this is a necessary and proper response for citizens of this country to make regarding a piece of legislation which threatens to balkanize this country and paralyse us as a nation.

I would like to thank you for your attention. We are now privileged to present the position paper of B'nai Brith Women of Canada.

B'nai Brith Women of Canada position paper on the 1987 constitutional accord, presented to

the Ontario select committee on constitutional reform, March 8, 1988. I will not read the table of contents; it is not necessary.

Introduction. B'nai Brith Women of Canada is a national volunteer organization representing 5,000 women across Canada.

B'nai Brith Women of Canada cares a great deal about the Constitution of Canada because, as the supreme law of our land, it supersedes all other laws and thereby regulates a multitude of aspects of our lives. As women make up more than half the population of our country, we have an enormous stake in the contents of the Constitution since it has the power to curtail or strengthen all the legislative rights we have gained over the years.

As a national women's organization, we of B'nai Brith Women of Canada feel that we have a responsibility to do our utmost to ensure that the provisions of the Constitution, as well as any amendments to it, are just and protect the interests of women.

Concerns of B'nai Brith Women of Canada. After much study and deliberation, we of B'nai Brith Women of Canada feel that there are five major areas of concern to us. These areas are: (a) our concern with the lack of clarity in the wording of the accord; (b) our specific worries in relation to the impact of the accord on the equality rights of women; (c) the accord's failings in the area of the federal spending power; (d) the amending formula; and (e) our disapproval of the process followed in reaching the accord.

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Lack of clarity. As the Constitution of Canada is the supreme law of our nation, we strongly believe that the rights it contains should be as clearly expressed and as well defined as possible. It is important that ordinary Canadians be able to make sense of the Constitution without the need of advanced legal expertise and that the rights protected in the Constitution have the same meaning for everyone. Otherwise, the real authors of our supreme law are not our elected leaders but the courts.

Unfortunately, the 1987 Constitutional accord fails all of these tests. Its terminology in many sections, but especially in the area of federal spending power, is dangerously unclear and imprecise. The result is that the real decision-makers on those issues, many of which have a direct impact on our lives, will be courts, where women are drastically underrepresented and which have a long tradition of being insensitive to the needs of women.

B'nai Brith Women of Canada deprecates the fact that so many parts of the constitutional accord are unclear and imprecise, and calls on all Canadian governments to develop clear laws that leave as little room as possible for interpretation by the courts.

Equality rights of women. As was mentioned by the other women's advocates who appeared before this committee, the equality rights of women as they now exist in the Canadian Charter of Rights and Freedoms are very new and were won through the huge efforts of thousands of Canadian women. The impact of these provisions is still largely unknown, since no case involving gender equality has yet been determined by the Supreme Court of Canada.

This uncertainty regarding gender equality rights in the charter makes it particularly crucial that no new provision adopted through the 1987 accord diminish women's rights in any way or even cast a doubt on their interpretation. The conclusion we have reached after a great deal of thought is that the present wording of section 16 of the accord does in fact put women's rights at risk. We feel that the only solution is to delete section 16 and add provisions so that the charter rights prevail over the Meech Lake accord.

Federal spending power. Our members are worried about the potential impact of the proposed addition of section 106A to the Constitution Act, 1867. The proposed addition is in there; I am not going to bore you by reading it again.

This proposed addition is of particular concern to B'nai Brith Women of Canada because of the importance to women of such shared-cost programs as the Canada assistance plan and health care financing under the established programs financing legislation. Women are disproportionately represented among the poor, who are now supported through welfare provisions of the Canada assistance plan. The current child care funding is also carried out through the Canada assistance plan, and proposals for new child care funding arrangements involve federal-provincial cost-sharing of grants to services. Women make up a large percentage of the workers in the health care system and will also be hit as consumers with any weakening of medicare.

We are concerned about the ambiguity surrounding a number of the terms which appear in the proposed amendment. Our major concern is with the term "national objectives." This has not been clearly defined and is being interpreted differently by different first ministers. We fear that no clear definition is being provided because



there is no real agreement about what the term means. Here, as elsewhere in the constitutional accord, ambiguous wording appears to be the essential condition for provincial approval of the accord and is being used to gloss over a lack of genuine consensus.

In the absence of this consensus, the task of defining "national objectives" will end up in the courts without any clear guidelines from the elected branch of government. This will result in inequities in the vital services available to all of our citizens. Canadians have the right to the same level of services no matter where they live.

**Mrs. Rose:** The accord changes the future amendment procedure by requiring unanimous consent of all provinces to changes to significant national institutions, such as the Senate, the Supreme Court and the establishment of new provinces. With the provinces gaining such extensive veto powers, their bargaining leverage is increased in virtually any area of federal-provincial negotiations, opening the door to many future deadlocks. Obtaining unanimous approval is highly unlikely, and therefore change in any area becomes improbable. The only acceptable amending formula is the return to the amending formula in the current Constitution, 1982, this being consent of seven provinces accounting for 50 per cent of the national population.

The process. Prime Minister Mulroney assured Canadians that the democratic process would be respected and that the public would have the opportunity to be consulted before the coming into force of the Meech Lake accord. His statement certainly seemed to imply that amendments could be made to the accord if such was the will of the people. Before long, however, it became clear that the Prime Minister and all the premiers had committed themselves to ratifying the accord without any modifications.

B'nai Brith Women of Canada questions the validity of a purportedly democratic process which on one hand invites public consultation and on the other hand denies the possibility of amendments to the Meech Lake accord. You, the select committee, are empowered to make recommendations to the Ontario Legislature. We urge you to recommend amendments to the accord before it is ratified.

In conclusion, the members of B'nai Brith Women of Canada strongly recommend that the government of Ontario fully support our contention that amendments must be made to the Meech Lake constitutional accord to ensure that these

constitutional changes are acceptable to and equitable for all present and future Canadians.

I would like to make a personal statement in addition to our formal presentation. As my colleague stated, we are not lawyers or constitutional experts or professors. I am a private citizen and, because of my involvement with B'nai Brith Women of Canada, I was invited to attend several meetings of women's organizations who were joined together in the task of showing the government that we will not stand still and accept the inequities that ratification of the Meech Lake accord will make to our lives and the lives of all Canadians.

My involvement began on October 18, the anniversary of Persons Day, when women were recognized as being equal to men, at least as far as their enfranchisement to vote in Canadian elections was concerned. Since that time, women have fought long and hard to ensure that our rights were guaranteed, and in 1982, with the Charter of Rights, we felt that this battle had ended.

We were wrong. Prime Minister Mulroney and the 10 first ministers have shown, with their undemocratically worded and presented Meech Lake accord, that the equality rights of women are again at risk. I am here today, on March 8, International Women's Day, to say to Prime Minister Mulroney and to all of the first ministers that my equality rights will no longer be guaranteed should the Meech Lake accord be ratified unchanged and become part of the Constitution of Canada, and I say no to this. I will not just sit still and allow this to happen.

Once again I urge you, the select committee, to ensure that our recommendations for amendments to the Meech Lake accord become your recommendations to the Ontario Legislature. Join us in the fight to preserve the Canada we know, where all enjoy the same rights and freedoms.

**Mr. Chairman:** Thank you very much for your presentation and, as well, for the two more personal statements and for the feeling that was contained within them. Certainly the presentation is clear and succinct and your recommendations are very straightforward.

With that, we will begin the questioning with Mr. Harris.

1520

**Mr. Harris:** I thought your preamble was suggesting that it is so clear there is no need for any questions, but I will—

**Mrs. Feldman:** That would have been nice, but OK.

**Mr. Chairman:** Life is somehow never that simple.

**Mrs. Feldman:** No, it is never that simple.

**Mr. Harris:** Let me say that as a nonprofessor, nonconstitutional expert, nonlawyer I share your concern on clarity, on equality rights, on the amending formula and on the process. I think a number have expressed concerns in many of those areas and I want to tell you that I share those with you.

I want to ask you just briefly about page 6. The bold statement is that "Canadians have the right to the same level of services no matter where they live." What services do we as Canadians have the right to that will be the same no matter where we live?

**Mrs. Rose:** All right. What we are concerned about are the shared-cost programs. If the Meech Lake accord goes through as it is written without amendment, with the provinces being allowed the option to opt out of shared-cost programs, programs such as universal medicare, child care, welfare, disability pensions, workers' compensation, skills training, those types of programs will not be offered at the same level from province to province.

We feel that a worker who is injured on the job in Nova Scotia and a worker who is injured on the job in Manitoba must have the same degree of compensation and assistance. It should not matter. We are worried that if the provinces can opt out, that will not happen.

**Mr. Harris:** I raise this because the last presenters, I think, raised it too. We are hearing more and more about the rights of Canadians, regardless of where they live, to expect something basic. Of course what is basic keeps being added to each year. What was basic 10 years ago is not basic any more and it keeps getting added on to.

Also, all these areas traditionally have been under provincial jurisdiction, like the Workers' Compensation Board, and I hear you saying that really should be a federal responsibility. We want a federal standard. We want them setting the national objectives in health care and education, so you can transfer back and forth.

I will ask you the same question I asked the last group. If all the provinces are going to do—and do not get me wrong. I am concerned about federal powers in Meech Lake and in former compromises that have been made—but I sense from a number of presenters a view that all the provinces should be doing is delivering the services that the federal government tells us, "This is what you are

going to do in the name of equality across the country."

**Mrs. Feldman:** No. I think what we are trying to say is that we feel there should at least be a minimum standard set by the federal government. If a province is lucky enough to have the funds and wishes to enhance a program, that is splendid. Why not?

**Mr. Harris:** Why should Canadians who live in a province that happens to be rich—oil prices are up high or nickel prices are up high—get the advantage of this enhanced service and not Canadians in other areas of the country?

**Mrs. Feldman:** Now you are discussing the way things should be ideally, in the perfect way. The way things have been working up to now has not been that bad. What we are concerned about now is that a province could take the funds for child care and decide, rather than funding child care centres, to use those funds other ways because the national objectives are not delineated anywhere.

There is no delineation of what a national objective is. If you do not have a delineation of what it is, how can you opt in, opt out or make your own arrangements? You do not have a base to start from. What we are probably saying is there should at least be federal minimum standards set in each area, and the province should not just be able to say: "We are going to do something about child care. Give us the funds and we will work something out; don't worry."

**Mr. Harris:** I am not saying I agree with them but I have heard people say: "I agree with you in your interpretation of Meech Lake. That is why I like it, because it keeps the feds and their noses out of the provincial business, if it is none of their business."

**Mrs. Rose:** I think there has to be a balance of power between the federal government and the provincial government.

**Mr. Harris:** But I sense from you a view that the federal government should involve itself in setting national standards in far more areas of provincial jurisdiction than it does now. Would that be a fair statement?

**Mrs. Rose:** That is not exactly what we are saying. It is just that there have to be some basic standards set.

In addition, if I could just go back to something you said earlier, that the ones we have listed are traditionally provincially administered programs, but—

**Mr. Harris:** But they are our areas of responsibility; in other words, it is the province that is to deliver.



**Mrs. Rose:** If you try to think to the future of things that are not even covered now—for example the environment, whose area of responsibility should that be? In the case of a train carrying toxic chemicals going across the railway system, if the provincial governments can decide their own way on this and there is no national standard, is the train going to be stopped at the border between Ontario and Manitoba by Manitoba saying, “No, you cannot go through here;” but the next province over saying, “Sure, we will take it. Airlift it over somehow”? It does not make sense. There are concerns that are not even done yet.

**Mr. Harris:** But all the arguments have been made. It makes logical sense again. Let us do away with these silly provinces that set up standards that are not uniform; everybody is exactly equal all across this country. Anyway, we will not solve that today.

**Mrs. Feldman:** I do not think so.

**Mr. Chairman:** Mr. Allen; he will solve this problem.

**Mr. Allen:** As you talked with regard to questions of level of services and with regard to broad principles of equality across the regions of the country, I was reminded that ever since the great inquest into Confederation at the time of the late years of the Depression, the Rowell-Sirois royal commission, and as we moved into the world of transfer payments, equalization payments and so on, we initiated a period in our history in which now for 40-plus years we at least have had operative in some sense the notion that all Canadians have a right to equivalent services without the burden of unequal taxation. I think it is important for us to bear in mind that we have had those decades there, which established that principle even though we have not always lived up to the principle very fully.

When we begin to look at new formulations of federal-provincial relations, like the spending powers clause in the Meech Lake accord, it just ran into my mind that one could paraphrase Lord Watson’s famous comment when he said, “The ship of state, as it sails on, none the less maintains its watertight compartments,” to read, “As the ship of state sails on, it does not jettison as it goes the contents of the hold.”

There is somehow a kind of history of a certain stability built into our practices, which makes it unlikely that the kind of example that you gave to us of an absolute standoff between a province and the federal government with regard to transportation of certain goods would in fact take place to

move it into yet another domain in the Constitution.

You and several other groups have raised the question of clarity. When we went through the matter of language with some of the constitutional experts who came before us and some of the professors who were there, I am not sure that we resolved the question, but there was at least some discussion of whether crystal clarity was either always possible or necessary or even wise.

I would just ask you whether it is worth thinking about for a few minutes that it might be more difficult to field national shared-cost programs if the language were too clear or if we strove for too great a clarity of language, simply because it would be so difficult to get anything in place that you would never get anything started. If there is a certain amount of ambiguity there, it gives you some sort of room to play around in. Everybody can think he is getting a part of the ball game, getting into the game. At the end of the day you might end up with a program and have more than you had before you started. Is there anything, from your point of view, worth thinking about at that level when it comes to clarity and ambiguity in this business of framing constitutions?

1530

**Mrs. Feldman:** I just feel that once you put something down, it is sort of like the Charter of Rights. Before we had it, there was a lot of movement. There was a certain amount of freedom for different interpretations. Once you carve it in stone, so to speak, it becomes a solid piece of legislation and the interpretation is just an interpretation of whoever happens to—you can play with the words a little bit. It is the same as an invitation. If you are not included in, then you assume you are included out.

**Mr. Allen:** Yes.

**Mrs. Feldman:** If it says “family,” that means everybody. If it says “Mr. and Mrs.” or just “Mrs.,” then you take it to be understood that the other parties are not included. Right?

That is the problem here. You have taken something that appears to be starting to work and you are introducing something else before we have had a chance to have the Charter of Rights put into play. I think clarity in this case might be—if it is ambiguous because they chose to make it ambiguous, because they did not want a lot of aggravation about questions on very specific wording, that was the choice of the people who drew it up. But if it is ambiguous because they really do not know or maybe do not want to know

what it actually means or could lead to, then I think it is a little bit dangerous.

Do not forget that the first ministers you have there now who signed this accord will not always be there. There will be other first ministers who may not have a clue what was in the minds of these people who drafted this because there are so many cloudy areas. What are you going to do at that point? Redraft it? I think there are too many.

**Mr. Allen:** The point that has sometimes been made is that as you move into that next generation or two which may not have known the context, none the less, unless you have been terribly precise, it provides that generation with an option of moving in its own direction to fulfil its own objectives, without having been tied down to the sort of explicit standards that may have satisfied one age but do not satisfy another.

**Mrs. Feldman:** Point well taken.

**Mr. Allen:** I am raising the question just to further a little bit of thinking on the process because this is a very difficult question for us all to try to come to grips with and to settle in a very conclusive way. Our committee has been working it over now for several weeks and I do not think we have come to a single mind yet about that kind of question as to how much you want to tie it all down.

An example that was given to us this morning, I believe, was the phrase "peace, order and good government." We all think we know what that means now and I think John A. Macdonald thought he knew what it meant, but in the intervening years, there was an awful lot of debate as to what it really did mean and who it gave how many powers to and why.

**Miss Roberts:** If I might go on from that point, I appreciated your brief on several of the points that are of concern to us all. The lack of clarity in the wording, I think, is something that can be pointed out. As you are aware and have indicated, with the charter itself it has not yet been determined just exactly what certain equality rights are.

I would like to point out to you that sections 8 says, "Everyone has the right to be secure against unreasonable search or seizure." It seems very straightforward. There have been more cases in the Supreme Court of Canada with respect to that one than you would ever care to think about and there will continue to be more cases with respect to that. So just because something is clear or precise does not necessarily mean that in certain situations we are not going to be trying to fine-tune exactly what that means. I think those are concerns we all have with respect to how

clear and how straightforward, going on from what Mr. Allen has said.

I think it is important that your concerns about the equality be addressed. We have a problem in that we still do not know what the charter says. That is the basic problem. You may not like what the charter says. Therefore, I do not know if I want the charter to overrule what is in the accord if you think the accord overrules the charter or vice versa. We are looking at two basic documents, one which is in existence that has not been interpreted by the courts in certain areas and one that we are all trying to interpret.

Your comments with respect to the equality of women: I assume you think you could fix it all if you just deleted section 16 and said the charter supercedes the accord or supercedes the Constitution. Which one?

**Mrs. Feldman:** I think we agree it should supercede the accord. We feel it took so long to get the provisions in the charter that we would not like to see anything supercede those provisions. This uncertainty is very—we are just uneasy with it. We feel it took so many years to get that equality rights section into the Constitution. That happened only in 1982. As you said, we have not had a chance yet to see how it is working. We do not like to see another document come along that looks as if it may be diminishing what was guaranteed in the 1982 Charter of Rights.

It is so uncertain. It is the same thing I said before. If you are not in, does that mean you are out? If you are not specifically mentioned, does that mean you are not specifically protected? I do not know. This is the problem.

**Miss Roberts:** The problem that has been stated to us, if I might comment very briefly, is that the accord changes the Constitution Act, 1867, and puts in the "distinct society" clause which is something everyone is concerned about. Well, it changes and amends the Constitution with respect to that; it does not amend the charter with respect to that. Therefore, you have to consider the documents together as to what is going to happen once the Constitution is amended with respect to the "distinct society" clause and what happens with respect to the charter. Those are two things I would like you to think about that we have to come to grips with. I point out to you that just saying the charter supercedes the accord or something like that, I am not so sure will do what you expect it will do.

**Mr. Breagh:** Just a couple of quick ones: I think you are aware that the Prime Minister of the country, to quote from a Globe and Mail story, I think this morning, says: "Everybody has en-



dorsed it. Those who want to oppose it, let them do it; they'll have to answer for it at the proper time." I am feeling very threatened by Brian today.

**Mrs. Feldman:** I read that too. I was really disappointed.

**Mr. Breagh:** Even the Premier of Ontario (Mr. Peterson) seems to be threatening me too. This is kind of heavy duty political power aimed at me here. I tend to agree you have focused on a section that a lot of people have at least questioned, and some have even gone so far as to challenge before the Supreme Court of Canada: what is the impact on the Charter of Rights by this accord?

You recommend one option which is to simply delete that section of the accord and let the charter stand by itself. Others have advocated that maybe we could join in the reference concept, that we will refer that section to the Supreme Court and get a court decision which determines: did Mulroney slip into honesty here and actually find out whether the accord does or does not have any impact on the charter?

There does seem to be an outstanding question for a lot of people. We need to clearly establish what that relationship is. Is the Charter of Rights and Freedoms supreme to this agreement? Does this agreement have an impact on it? Do you really care which way this is done: deletion, court referral, amendment? Is there a serious preference there for any mechanism? Are you searching for any mechanism which clearly establishes what is going on here?

**Mrs. Rose:** Myself, I am afraid of a Supreme Court referral for a ruling there. They are not accountable.

**Mr. Breagh:** Excuse me. The problem we are struggling with is that no matter what we do as politicians, it will always in the end be subject to the decision of the court, so the argument is, let us get that court decision as quickly as we can so at least we know what we are dealing with.

**Mrs. Feldman:** I really am not an expert in this kind of thing.

**Mr. Breagh:** You are in a room full of people with the same qualifications. Do not worry.

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**Mrs. Feldman:** Wonderful. I have a feeling that I would not personally have a strong objection to whichever mechanism was used as long as it was recognized that this is a very serious flaw. We are uneasy with the way it was done. We are very uneasy with the attitude; and

this scares me, I do not mind telling you. I do not like to see this kind of statement being made. I know it may just be political rhetoric and I am not naïve enough to think that a lot of discussion is not going on behind closed doors. But even to be able to feel free to come out and make a statement like that is really worrying to me.

I was really sincere when I said I do not like and I am uneasy with the direction the government of the country is going. There is a certain element of high-handedness that really makes me nervous about our country. It is a wonderful country. I think it is probably the best country in the world today to live in and it could be even better.

I have a family I hope will be growing up and continuing to grow in this country. I would like to feel that there is a certain openness to our government. I do not care about the mechanism personally. I just care that it be there and it be recognized. I do not understand what the panic is about getting this thing ratified in the first place. According to everything we read, studied and were told, I think 1990 or something is the deadline. If there is something wrong with this, if people feel uneasy with it, if people do not feel they are being properly handled or treated, I do not understand why some mechanism could not be found; and there is a lot of time to do it.

Let us do it right. It is so much harder when something is done, ratified and passed to go back and change it. We have all the time in the world now to take counsel, to talk to each other and to talk to government and for governments to speak with us, not at us. Let us fix these things that are causing so much unease.

I do not care about the mechanism because I do not understand enough about it to know which mechanism is better. There are people better qualified. I would not have any problem, as long as I knew somebody somewhere was thinking about it in the manner you suggest and thinking really serious thoughts about doing something about this. I do not have any objections because I do not know that I have to have any.

**Mrs. Rose:** The point is to make the change now before it is ratified, because once it is ratified with the change in the amending formula that is included in the accord, it will be almost impossible to change it then. So take the time now, make the amendments and change it now.

**Mr. Breagh:** I am afraid you have a better understanding of the word "democracy" than Mr. Mulroney does.

There is one other quick point I want to chat a little bit about because I notice a number of

groups have talked about the federal government setting standards or objectives, or playing with those words.

I will tell you quite frankly the concern I have is that I do not share what seems to be a growing belief the federal government is better at doing this than other levels of government. I am reminded that the poorest province in the country initiated medicare, Saskatchewan, and that it took considerable bullying to get the federal government to come on side with that. At this point in time, I am not sure I want the federal government of Canada to do anything but dissolve itself and call an election. I do not share your abiding faith in the federal government. I believe there are provincial governments that could do a better job.

My preference would be to straighten out the matter of the Charter of Rights; I give that priority. If I did that, then it seems to me that a woman who wanted child care in Newfoundland would have some access to a court process that would allow that person and that child to have equal rights with the child in Ontario. I am more concerned about that than I am about getting into the game about setting standards, because the truth is that the standards for education, hospital care and transportation in this city are a hell of a lot different than they are in Kapuskasing. We all live with that reality.

I do not really want to play that game. What I am interested in is the larger question of do I have equal rights as a Canadian from one end of the country to the other, do those charter provisions stand up and is that clear? If I can get that rectified one way or the other, we will have these discussions about objectives and standards and all of that at conferences from one end of the country to the other.

**Mrs. Feldman:** I can live with that.

**Mr. Breaugh:** OK, thank you. I want this guy Mulroney put out of business.

**Mr. Chairman:** I think we should all in this room say to Mr. Breaugh that if at any moment he is under attack by either Prime Minister Mulroney or Premier Peterson, then we will indeed all come to his defence.

**Mr. Breaugh:** How well?

**Mr. Chairman:** A final word from Mr. Elliot.

**Mr. Elliot:** I just sent a note to the chairman requesting the privilege of being able to thank you and I apologize at the same time for not having some more time. There are about 10 questions I would like to ask of the group, but because we have a couple of other presentations

this afternoon, we really have to wind it up. It is obvious that your brief was very thorough and well prepared. It gives us a lot of cause for thought and it substantiated a lot of the other presentations we have already heard. I would like to thank you very much for taking the time to come.

**Mrs. Feldman:** Thank you and thank you very much for your attention.

**Mr. Chairman:** I now call upon the representatives of the Brantford Ethnoculturefest, Ria Marie Jenkins, the acting executive director, and Vince Bucci, if I pronounce that correctly, the president.

**Mr. Bucci:** Close enough.

**Mr. Chairman:** We want to thank you very much for joining us this afternoon. I apologize, as I did earlier, for increasingly running behind time. I think we have felt all along with this issue that it is terribly important to be able to hear the views of those who have come before us and to make sure we can get on the record the concerns and issues that you wish to raise. The fact we are starting late in no way means that we are going to alter your time frame. We all now have a copy of your presentation. If you would like to proceed with that, then we will follow up with questions, as we have with the other witnesses.

#### BRANTFORD ETHNOCULTUREFEST

**Mr. Bucci:** Before I proceed with the actual brief, I would like to commend the committee for having these meetings, however much of a charade it is if Mr. Peterson's comments in the Globe and Mail today are legitimate. If truly the government wanted input, I suggest that this committee should give an opportunity for a lot of working people to make presentations. It is very difficult for people from Brantford, working people, to take a day off, as I had to do, in order to come and make a presentation. The rest of our executive was not able to make those kinds of arrangements. It was certainly not a lack of interest on their part.

I suggest to you that the interest is much greater than perhaps it would appear from even the number of people who have taken the time to come to Toronto to make presentations. We believe this is a very serious situation and that is why we have taken the time and the day off to come before you to present our position.

The Brantford Ethnoculturefest is a multicultural social service agency operated by a nonprofit charitable corporation and is an umbrella organization representing 25 ethnocultural groups in the Brant county area. It has its roots in



the Brantford Multicultural and Citizenship Council of the 1950s, growing with folkloric community involvement to the highly successful International Villages Festival when it began in 1974.

Since a 1982 amalgamation, Ethnoculturefest has focused its efforts to encourage the recognition of the diverse heritage of all Canadians, thereby enhancing respect for ourselves as individuals, as members of families and of ethnocultural communities. As our services have evolved in response to the community, our mandate, and thus our programming, has been developed to fulfil three basic roles in the community.

As a unique social service agency, we address the culturally specific needs of our new Canadians and ethnocultural clients in their adaptation to Canadian lifestyle.

As a community educator, we facilitate respect and understanding through our promotion of positive intercultural and cross-cultural communications among our ethnocultural groups and the mainstream population.

As the co-ordinating agency for folkloric celebrations, such as the annual International Villages Festival, we promote and foster a sharing of our cultural heritage.

The Canadian and Brantford population, with the exception of our native people, is comprised totally of immigrants. It is appropriate, therefore, to have an image of our community as composed of a flow of people entering the country and gradually becoming a cohesive element of the mainstream, effecting a positive and constant transformation of our municipality. The concept of multiculturalism, thus, comes alive in our community. Our services, institutions and government must be responsive to the people we all serve.

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It is, therefore, quite appropriate that Brantford Ethnoculturefest submits this brief in response to the constitutional accord reached at the first ministers' conference on April 28, 1987, at Meech Lake, Quebec. We recognize within the text of the agreement some dangerous subtleties and outright directives whose ramifications are counterproductive to the important nation-building successive governments have undertaken.

We recognize that others will be addressing concerns relating to the broader applications in their submissions to the select committee on constitutional reform. Consequently, this brief is

limited to those issues and concerns of the ethnocultural segment of the population.

Of tantamount importance to Canada is the preservation of the multicultural society afforded by our social, human rights and immigration policies. Legislators must treat their responsibility in this area seriously, as it is an imperative, not an option. Otherwise, the kudos that hailed the Charter of Rights and Freedoms as part of the Constitution Act will soon turn to condemnation of it as a charter of wrongs. We believe that the much belaboured wording of the document before us, The Constitutional Amendment, 1987, fails to protect the rights of cultural minorities from erosion.

With the pronouncement of Quebec as a distinct society within Canada and the separate designation of French- and English-speaking Canada, lines are drawn delineating a black-and-white silhouette of our nation. Gone is the multicultural mosaic, which has been an ever-increasing reality, even long before the federal government's inception of an official multicultural policy in October 1971. No collective of participants at a first ministers' conference has been empowered to derogate the multicultural rights guaranteed in the Charter of Rights. Yet we see in the Meech Lake accord only token recognition of the multicultural nature of the country, including Quebec's population.

We would point to the timing of the deliberations on multiculturalism to demonstrate the low priority placed on it as a component of such an important document. The entrenchment of multiculturalism in the Constitution was on the table around 2 a.m. Prime Minister Brian Mulroney called a coffee break for 15 minutes, and by 2:30 a.m. multiculturalism had the premiers' approval, with the final vote concluded at 4:30 a.m. Is this cursory treatment of a cornerstone of our national policy appropriate 16 and a half hours into the lengthy path towards an historical landmark? We think not.

Clearly, Premier Bourassa objected to anything that would dilute the special status sought for the francophones in Quebec. However, to use basic rights as a political pawn to win Quebec's hand in the constitutional marriage is a high dowry to seek of the rest of Canada. As a result, the Charter of Rights is no longer entrenched in the Constitution, as citizenship is no longer founded on a set of commonly shared values.

This is shown in section 16 of the schedule to the Constitution Amendment, 1987, intimating that, while the recognition of Canada's duality and Quebec's distinctiveness does not abrogate

the charter's provisions on multicultural and aboriginal rights, the remaining freedoms of speech, association and religion, equality, mobility and minority-language education rights are not protected. The retention of one's culture is meaningless without the latter safeguards. The intent of the Meech Lake accord can be interpreted as basic rights may vary or be restricted depending on the province in which we live, the language we speak or the membership in privileged groups.

We object to the first ministers' appeasement of politically significant groups rather than the conscious entrenchment of a collectivist vision. Labelling in order to assert rights is a divisive, not a unifying course. Sadly, we see in the words of the crafters of this piece a mindset which belies any lipservice paid to protecting multiculturalism under section 16 of the accord.

Reed Scowen, parliamentary assistant to Premier Bourassa, wrote in a *Southam News* article that in the accord's unanimity was seen "a deepening understanding of the way in which two great cultures can live together in the same political space for the enrichment of everyone." Two great cultures do not a multicultural nation make, nor is that the Canadian experience. If this province endorses the amendment as it stands, our fears persist that one could use the "distinct society" clause to discriminate against minorities with legislation like Quebec's Bill 101.

Inherent in the maintenance of our multicultural society and an imperative for population levels is a progressive immigration policy. Canada's record in the international arena has been stellar in terms of human rights and social initiatives. It would be tragic then to undertake regressive measures, cited in the amendment, that promote disparity in the treatment of newcomers to our country. The federal government can be directed to withdraw services, except citizenship services, for reception and integration, including linguistic and cultural, of all foreign nationals wishing to settle in Quebec where said services are to be provided by Quebec, as funded federally.

With this also a possibility for other provinces, the potential abuses are horrifying. At Premier Bourassa's insistence, not even the programming standards or criteria, only the general objectives, can be expected of the provincial service delivery. The already existent regional disparity wreaks havoc with the provision of similar services through individual provincial mechanisms. To further remove immigration from the federal purview, especially with the uncertainty

of free trade effects impending in the near future, is to ignore the reality of market fluctuations on regional economies and social programming. As health and education services display such marked differences across the country, how could the uniformity of immigration programs ever be conceived?

According to Quebec a formal voice in the immigration policy flies in the face of the entrenched freedom of mobility, which may be suspended to further Quebec's language-bolstering mission. If it is required that a newcomer go first to Quebec because of French-speaking abilities and then is allowed to proceed to an original province of choice, this is an obstructive extra step which furthers neither Quebec's apparent vision nor Canada's humanitarian policies towards landed immigrants.

While the decade-old Cullen-Couture treaty was hailed as a panacea for maintaining Quebec's French-speaking majority, it serves only that province's purpose and is oblivious to the greater stress of the uprooting immigration process that necessitates a social support system and appropriate reception and assistance in integration. As this does not appear to be a concern of the first ministers in this amendment, we cannot support the document.

Our next point of contention is one which should be of concern to all citizens who entrust their legislators to enact laws for the overall good. How could political representatives endorse a Constitution which can exempt laws from the application of the Charter of Rights and Freedoms in some cases? By allowing the overriding clause of the charter to stand, the first ministers have left the door open for suspension of guaranteed rights in extraordinary cases. This "notwithstanding" section of the act, which allows Parliament or any provincial government to overrule 10 sections of the charter, was included in the charter as an escape hatch from impractical court decisions based on the loose drafting of the charter. It was irresponsible of the first ministers tacitly to condone this potential breach by not moving to delete the "notwithstanding" section.

Finally, we must join our voice with that of the Canadian Ethnocultural Council in that its request for a guarantee of minority ethnic-group representation on the Supreme Court was ignored in the amended text. This is an area about which our organization feels quite strongly. By presenting a brief to the standing committee on procedural affairs and agencies, boards and commissions on January 30, 1986, we argued for



the need for appointments to government's voluntary committees to be more reflective of ethnocultural population base. This is an area in which it is incumbent upon the legislators to display leadership in acknowledging the demographic reality and ensuring that the mechanism for choosing senators will, by guarantee of our Constitution, reflect the populace.

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In conclusion, we will comment on the significance of the process preceding ratification of this amendment to our Constitution. On joining their pens in signing the accord, the Prime Minister and the premiers gave their assurance that the pivotal Charter of Rights and Freedoms would be unchanged. Yet each of these first ministers has gone back to his province and given a different interpretation of the text. By their own admissions, only a court's interpretation would ensure shore-to-shore uniformity. In addition, Eugene Forsey, Michael Bliss, Michael Pitfield, Pierre Trudeau and other constitutional and historical authorities refute the stated sanctity of the charter, predicting the accord's wording as exposing our guaranteed rights to widespread breaches.

As there are clearly well-articulated dissenting views on either side of this issue, it is imperative that the endorsement of the amendment as circulated not be a *fait accompli*. With the text bearing the approval of provincial signatories, it appears unlikely that amendments would be entertained, sadly rendering the valuable work of this constitutional select committee as costly window-dressing. This would be a miscarriage of justice.

Rather, in elevating above rhetoric the Premier's election promise to elicit constituents' input, the government should seek a ruling from the Supreme Court. Thus we will be assured that our legislators are truly convinced of the validity of multiculturalism and of the Charter of Rights as its cornerstone.

While Ontario has shown individual initiative in its recently announced government-wide multiculturalism strategy, the Meech Lake constitutional amendment does nothing to further the national cause of multiculturalism, but rather is regressive. In following on the precedent established in resolving the separate school funding issue, the only responsible option of this government is to subject this amendment to the legal process to guarantee its citizens their rights.

We would like to express our appreciation to the select committee on constitutional reform for its careful consideration of the issues outlined in

our brief. We wish you much success in your deliberations.

**Mr. Chairman:** Thank you very much. One of the things you have brought forward in your brief is that I think this is the first time we have had some inkling of exactly what was going on at two o'clock in the morning or at any other time. I suppose this is one of the areas where one wonders, as the hours of the night pass, just who is saying what to whom and how many cups of coffee are being taken.

I want to thank you for the brief. You have raised a number of specific issues in particular areas that speak to the whole multicultural area, and I think it is useful for us to focus on some of those. We will begin the questioning with Mr. Eves.

**Mr. Eves:** You have made several points in your brief, and we want to thank you for the thought and the time you have put into your brief and for coming here today. I think it is very important that the committee hear viewpoints from all across the province. The committee was in London a week ago last Thursday, about 10 days ago, as you may or may not be aware.

You have raised the point of section 16 and charter rights and whether they will be overridden or not, and that is a point that many groups have made before this committee. You also expressed concern about the "distinct society" clause, the immigration clause and the Supreme Court clause, to name a few. I guess what I really want to get to is what action you are proposing this committee take.

You indicate that a court reference may be in order, but I do not see how a court reference is going to solve, for example, the immigration-clause concern you have or the Supreme Court-clause concern that you have. Are you recommending a court reference as the answer to all our problems or do you think that specific amendments are needed? Or, in fact, are you going farther than and saying that maybe we should go back to the drawing board and start all over?

**Mr. Bucci:** Ideally, it would be our recommendation to go back to the drawing board. I think, in a sense of frustration, we indicated that to you right at the beginning, but it would be totally naïve of us to think that would ever happen.

The position we are taking is, given that the Premier has stated that he is going to proceed and approve the accord in the spring, and seeing that this, in our view, is a very divisive issue within our province, particularly within the multicultural group and I am sure for women in general and

in numerous other situations—in our view, it is as divisive as the separate school question, that situation when the government opted out to get an actual ruling—if, in fact, the Premier's and the Prime Minister's position is legitimate, i.e., that the charter will be supreme, then let the courts say that before they proceed. That would be the first thing we would want.

The second thing would be to make recommendations that if, in fact, the provinces are going to have a say as to the candidates for the Supreme Court, then perhaps there should be an agreement among the premiers that the individuals who are nominated to the Supreme Court somehow should reflect the demographic analysis of Canada.

**Mr. Eves:** Thank you.

**Mr. Chairman:** Mr. Allen.

**Mr. Allen:** Thank you, Mr. Chairman. If other people want to get in on the questioning here—I hear they are sensitive about the fact that I have been jumping in quite frequently today.

**Miss Roberts:** Don't worry. I will jump right in after you.

**Mr. Allen:** OK. That is fine. I thought perhaps some other hands had gone up.

The question that I want to address to you has to do more with the general question of where you are coming from with regard to the Meech Lake accord in big terms rather than getting into some of the more precise things about immigration clauses and whatever that you referred to. There are one or two questions I have there but I will let them go for the moment.

I will preface this by saying—to put it charitably and without trying to read too much into what was or was not going on in smoke-filled rooms in private conversations at Meech Lake—my sense is that what the premiers got together to try to do was to deal with the Quebec round and that some things had been left out of the 1982 settlement so far as it went. Spending powers had not been included; immigration had not been included. There was the whole problem, of course, of Quebec and whether Quebec retained a veto or did not retain a veto and what powers pertained to that province in the new arrangement of 1982.

Sooner or later, they had to come back to that question, so they asked themselves in the light of all the discussion that has gone on in this country about the place of Quebec in Confederation, how do we describe the relationship of Quebec to the rest of the country in terms of official languages?

They had a very neat and concise description, which is about as close as anyone has come to describing, I guess, the lie of the land with regard to the languages in which people function in Canada and that one province tends to be the homeland of one of those languages and the other provinces tend to have the English language as a sort of lingua franca or common currency of their daily affairs, so each has its own minority within it.

When they talked about Quebec in relationship to the rest of the country, they described it as a society. Nowhere apart from section 16, unless I have missed something, is the word "culture" used and nowhere outside that is there any reference or attempt to wrestle with the place of languages that are not official languages.

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I sense, therefore, that what is being addressed is two broad societies, both of which are manifestly and irreversibly multicultural, both of which have other language groups within them that are interested in pursuing and maintaining their language and certain aspects of their life; but who do not have any of those languages as—and to the best of my knowledge do not pretend to ask that any of those languages become—the common language of whole provinces or of our general public discussion in the country even though they might be used from time to time, and should be, in my view.

In the light of that, is that your understanding of what they were trying to do and what the result was? If it is, then there does remain an outstanding task, it seems to me, which is to go back to the question in some considerable detail as to what we really do mean by being multicultural both in Quebec and the rest of the country.

In so far as multicultural rights were established in the charter and in the other constitutional framework that we have got, you managed to get it back. The multicultural community managed to get it back in section 16 and in the amendments that were placed in the immigration section, which provided that the charter would apply in all respects to all decisions made with respect to immigration. That preserves mobility rights, of course, and other matters.

I have difficulty, if I understand it that way, concluding that the multicultural community lost anything. It might have gained things if Meech Lake had been construed in broader terms and if they tackled bigger agendas and if they had done this and if they had done that, they might have strengthened it. I am having difficulty, quite



honestly, understanding where something was lost, yet you seem to be telling me that. Can you help me?

**Mr. Bucci:** OK. I think that if in fact the charter becomes secondary, the section on individual rights and collective rights—and those are the two components, and I believe they came into effect last April or so—in the section the multicultural groups will use in order to ensure equality. If our interpretation is legitimate the charter becomes secondary and those clauses are no longer valid, then multicultural groups will lose out what we have gained at this point in time.

**Mr. Allen:** If I could just press you for a minute. The charter is obviously supreme over the immigration section—Right?—and the multicultural rights, as they existed in the charter are reaffirmed. Nothing in the Meech Lake accord as stated in section 16 is to reduce or derogate from those multicultural rights in the charter.

If that is true, then how much further—I am not talking about women or other groups; there may be an argument there—from the point of view of multicultural groups what more can be gained specifically in any amendment or change to the charter other than going on to the big agenda, which I think does need still to be worked out in some detail in this country as to what multicultural rights mean in the longer run, given all the sort of substratum of Canadian life—the English, French and the rest of it?

**Mr. Bucci:** Mr. Allen, if I understand you correctly, there seems to be a gap in terms of communication here. I think what we are trying to present is that those two clauses, the individual and collective rights, are things that we feel protect multiculturalism and we do not need to go beyond that point. We are satisfied. But we want to make sure that the charter is supreme, and we think the Meech Lake accord does not address that.

It seems to me and to a lot of experts that perhaps the clauses that we have referred to in the Meech Lake accord will make the charter secondary. If that is the case, then collective groups—if it is an Italian group or a Muslim association or whatever—will end up losing certain fundamental rights that we now have, because of the “distinct society” clause.

**Mr. Allen:** If you went to the Supreme Court and the Supreme Court said, “Yes, the charter is secondary to Meech Lake,” then you would be in trouble.

**Mr. Bucci:** That is right.

**Mr. Allen:** But that has not happened yet.

**Mr. Bucci:** That is why we are asking you to go to the courts before you pass it.

**Mr. Allen:** But you see, I am just asking you specifically, from the point of view of the groups that you represent, the multicultural community: You have, in fact, got the supremacy of the charter built into the immigration section and section 16, and I am asking you if there is any other aspect of that agreement that gives you trouble, where you think that somehow the multicultural community has in fact lost something. I am not quite sure what that is, that is all.

**Miss Jenkins:** In effect, we have concerns as well from the immigration component. If the government can be directed to withdraw services, including linguistic and cultural, for reception and integration of newcomers, that is going to erode our multiculturalism policy as a fundamental right for the cultural retention. If that is withdrawn from a federal responsibility to a provincial one, while Ontario has a very good record of what it is doing in citizenship concerns, we have no way of ensuring that will be uniform across the country. That would be a step backwards from our 1971 multiculturalism policy. So it is tied in. Even though we have assurances about the charter, this immigration component does cause us concern.

**Mr. Allen:** You would think that, since the charter is affirmed in the immigration section, therefore the equality clauses of the charter would require that there be that standard across the country and that therefore the federal government would have to exercise it because it is the only way they could get equality—unless you had a concordat of all the provinces agreeing to that, which the Supreme Court might well dictate under a challenge, the way the immigration section is—

**Mr. Chairman:** Can I just jump in with a supplementary here, because I just want to be clear on our understanding? In subsection 95B(3), which is the section which affirms, as I read it, the Canadian Charter of Rights and Freedoms with respect to the section on immigration, I would read that as saying that basically means then that whatever is in the charter, no matter what happens, is in the accord, where they have said that the Charter of Rights and Freedoms with respect to any immigration agreement must be followed.

What you are saying is that is still not enough. Is that it? That would appear to confirm everything that is in the charter, but you are

saying that it does not, or that there are some other things that need to be affirmed. I thought the reason that was added, and it is something that was added, was to deal specifically with the concerns that you raise.

I just want to make sure I am very clear on what you are saying here, because my reading of that says they are underlining it and highlighting it and saying whatever is in the Canadian Charter of Rights and Freedoms applies to any of the agreements and therefore there cannot be any infringement on mobility rights or anything else as it is set out under the charter. I just want to be clear that I understand your concern there.

**Miss Jenkins:** The point I was making was that we would not have the uniformity of services if the citizenship services tied in with immigration were not uniform across the provinces and it was not built in that we could impose standards from the federal to the provincial level, but rather just a service be provided. Only general objectives can be insisted upon, not standards.

**Mr. Chairman:** Yes, but that is not specifically a charter issue, but rather another one.

**Miss Jenkins:** Correct. It is another one which came of the Meech Lake accord.

**Mr. Chairman:** OK.

**Mr. Allen:** It was essentially that whole question I just wanted to lay before you, because it is more than a little puzzling and there seems to have been an attempt to respond to the questions you have been raising. I am just trying to get some detail from you as to where the remaining problems lie. I hear what you have said with respect to immigration services, processing, reception quality and that kind of thing, and I think one would have some concern about that, but I understand that would be built into any agreement that has force of law under that section 3. I will just leave it with you. If you have some more on that in detail that you can feed back to us, I would appreciate having it because we are trying to work our way through that.

1620

**Miss Roberts:** I would also like to thank you for your presentation. We have had several presentations from multicultural groups and your presentation as well indicates the concern that a large section of our population has with respect to the "distinct society" and the entire Meech Lake accord.

I would like to sort of look into the future, with or without the Meech Lake accord. There are changes that have to be made to the charter. The charter is not a document that is without flaws; it

is flawed as well, which we are all aware of. There are some changes that should be made to make it more reflective of a changing Canadian mosaic, which is of concern to us all, and the Constitution most likely will have to be changed as we go from one decade to the next.

Process is very important. The process that brought us here is one that has been called flawed and many other things. Have you considered what process you would like to see put in place for changes to the charter or to the Constitution or to any other constitutional document, how you would like to have your input into the political system or into some system to keep a living charter going?

**Mr. Bucci:** I see that as a two-part question. First of all, in a very practical sense, it is my view that if this Meech Lake accord proceeds, we will never see any changes either to the Constitution or to the charter, because you need everyone to agree and I do not think you will get everyone to agree ever again. That is one component.

**Miss Roberts:** Remember that there are two amending formulas, which you are aware of, so you do not need everyone to agree on each amendment.

**Mr. Bucci:** What we would probably like to see is tentative agreements by the premiers, except a Premier should not necessarily place his reputation on the line by signing these tentative agreements or changes, so that groups would have an opportunity to have input. Then we would like to see a free vote in each Legislature. I think that would be a fair game.

**Miss Roberts:** That is a good straightforward answer.

**Mr. Chairman:** I want to thank you very much for coming this afternoon and presenting your brief, as well as answering a number of questions. As you can see, we are at the point in our deliberations where we are trying to work our way through a number of areas. It is very helpful when a group such as yours focuses on a particular area and we try to think through some of the concerns and how we attempt to deal with those as we move on towards our report. We do want to thank you very much for coming this afternoon and sharing your thoughts with us.

Perhaps I could now ask E. A. Turner if he would be good enough to come forward. Mr. Turner, I apologize; we fell behind early today. I am afraid we are still trying to get caught up. We have a copy of the letter you wrote to the Premier. Perhaps you would like to make some opening remarks and then we can follow that up with



some questions. Again, we welcome you here this afternoon.

E. A. TURNER

**Mr. Turner:** First, I might say that I do not represent any group. I have a group of four and a half, my wife is another one, of five and a half and myself that I am perhaps speaking for. I am talking for my two sons, my daughter-in-law and my two grandsons. Meech Lake has done a lot to upset our family.

In my statement today, I will not refer to the "accord" as such. I firmly believe the majority of people outside Quebec oppose this deal and I therefore will refer to it as a "deal." I am not in business any more. I have lots of time, so 4:30 p.m. does not bother me. I have had deals in my time that were done at three o'clock in the morning, but always they were subject to examination, scrutiny and maybe second thoughts when you woke up after you slept in.

I recognize, based on statements by the Premier, that this committee is, in his opinion, toothless. He has declared that not one stitch of the deal will be unravelled. I had hoped this committee would be a little bit different from the Monte Kwinter free trade circus, and we shall see.

On my father's side, I am a fifth-generation Canadian, although I am not a Canadian; I will come to that later. I spent five years in the navy. I came home to married life, a job, raising two sons, completing my education in commerce at McGill University and retiring very successfully. I refused even an interregnum of 10 months; I refused to take a penny of unemployment insurance because it is beneath my dignity and still would be to take money such as that from other taxpayers.

Having been born and raised in Montreal and having come to Toronto in 1957, I can tell you that I have perhaps a more intimate knowledge of the people of Quebec than most of you—I am assuming that—and of how they act and react. I can give you prime examples of how the Meech Lake deal is going to work in Quebec, based on experience and not on a fanciful pipedream, as it now is.

I would like to buttress that by saying we had a large family on my wife's side and on my side in Montreal. My sister lives there with her husband now and her six kids are gone. My brother, his wife, and his six kids are gone. We are here and my kids are here. There are scarcely any of us left there, because even my nephew, who lives now in Calgary and who is fluently bilingual, was

refused a job because his name was Buckingham and not Lavolette. It was made very clear to him. So when I say I know how things are down there, believe me I know it from bitter personal family experience.

A common reaction to that, of course, which is very prevalent today in our media—television, radio and newspapers—is to instantly label such a person as a racist or a bigot and then get rid of him, but there are a lot of us bigots around, I guess.

The Meech Lake deal will pay money to any province which decides to do its own thing on national social programs. Quebec, of course, as I am very much aware, will do its own thing. They do it in income tax and income tax collection and even will not permit you to have your old age security cheque deposited from the government to your bank account; it has to go to them and they mail it to you to make sure you understand where all that good money is coming from. My sister goes through that; I know it.

There is no guarantee that they will spend all the transferred federal moneys on a designated program. You only have to look at the way they honoured the medicare agreement. On the medicare agreement, they promised that they would pay outside doctors—i.e., in the province of Ontario—Ontario rates if they treated Quebec patients. Anybody who reads the newspapers knows full well what they have done to the doctors in Ottawa who have to treat people across the river because there are no facilities over there. They simply gave them Quebec payments and said, "Now go whistle for the rest because we are not paying it to you."

1630

Let us touch on this "distinct society," which is really galling. Does this mean that the rest of Canada is indistinct or, as my neighbour says, "Maybe we just stink." This gets me back to my earlier statement when I said I was a native of Canada. Now it looks as though I am indistinct or second class, but not a Canadian.

Because of our peerless political system, where we are always looking and we are willing to pander to anybody for a vote—we will pander to any group, for that matter—we are all now hyphenated. After five years in the war to protect something I thought I cherished, I am not Canadian; I am a hyphenated Canadian—I presume either English-Canadian because of my father's background or Irish-Canadian because of my mother's background, but not Canadian. There is no such thing as a Canadian.

Now we are going to be further balkanized. French Canadians will be distinct, or first class, all others hyphenated and second class. I guess the Scots on Cape Breton Island will not be anything. It makes me laugh to hear the mindless prattle about losing our culture to the Americans. How can you have a Canadian culture when you do not have a simple, pure Canadian?

Meech Lake gives Quebec greater control over immigration whereby it can steadily increase its population, but Meech Lake forever limits a province such as Manitoba to less than five per cent of the national population. Meech Lake makes Quebec unilingual French-speaking, and all other provinces are to be bilingual. As Mr. Rémillard of the Quebec government said after the Meech Lake deal, this means we get rid of everything English in Quebec when the deal is ratified. Mr. Bourassa tried to play that statement down by saying, "Mr. Rémillard did not mean to say that at this time." He did not deny the contents of the statement, just the timing. What does this do to the 20 per cent English minority in Quebec, or does anybody outside Quebec really care?

I said I knew Quebecers and how they react from living there and from doing business there. As one French businessman told me, they started out by demanding changes in every political area to French, and always, but always, made sure that the Anglos were saddled with a sense of guilt. After all, it was the Anglos' fault that they had a lousy education system and that the church would not let them move away or that the church would not let them get into business. But that is overlooked. The system has worked, and now even our own government here wants to make Ontario officially bilingual while retaining a unilingual Quebec.

Meech Lake is giving Quebec special status in the Constitution and guarantees over the lesser provinces. Why should one province have special privileges? We are all supposed to be equal in the Constitution. When you pander to one province, you are taking away from another. Mr. Bourassa described Meech Lake as a great victory for Quebec. Is Canada now to be a country of victories or defeats for provinces? What kind of country will my grandsons live in?

Meech Lake is too important to leave to this quick, hurry-up deal that was perpetrated in the middle of the night. It is too important to leave to those people who have hyphenated us and now propose to balkanize us. I find it strange that Mr. Peterson, in writing to me, tells me he does not have to hold a provincial referendum on Meech

Lake, a deal which will be carved in stone, since he has 95 seats. However, Mr. Peterson wants a federal election on free trade, even while Mr. Mulroney won 211 seats.

I do not believe that we can live peacefully forever with the two different systems we have. It has been said from time immemorial that the French system of government is that everything is forbidden unless it is permitted and the English system of government is that everything is permitted unless it is forbidden. We cannot have both houses living in the same bedroom and hope to create any kind of offspring.

I could read you a long dissertation on why this will not work, but I am not going to bore you, because you are late and I know from what I have read that it is not going to make any difference anyhow. Mr. Peterson has come down from the mountain and delivered his sermon, and he says that what you and I think does not really matter.

In conclusion to these brief remarks, I just want to say that I regret this charade, but I am not surprised. I am surprised that we are going to get a tax increase when we spent over \$100,000 on the Fontaine by-election charade and we blew thousands upon thousands on the Monte Kwinter circus. Here we go again. It is no wonder, as I say, that my sons and his peers—my son is now 41—hold their noses when they discuss Canadian politics.

We are going down a wrong road here. People do not come into this country saying, "I am proud to be Canadian." As that man said to me in the train in the United States once, "The greatest thing in my life is to be an American citizen," and I do not think we are heading that way in this country. We are all hyphenated, balkanized and maybe even bastardized.

I was going to say that Mr. Peterson's arrogance is a reflection of Trudeau's arrogance, but I will not pursue that subject, although I have lengthy notes written on it. I will not take the low line enunciated in Ottawa by two of our national leaders by saying, "Tear it up or I am going to tear it up." I think we should go back to the drawing board, get some more input and find out how real people think about this.

I am not a member of any political party. Although this is not read with favour in many government places, I did work in Ottawa for 15 years in the private sector. But I belong to an organization that is anathema to politicians. It is called the National Citizens' Coalition, and our most recent survey of public opinion on this matter shows that 45 per cent of the people who were polled oppose it, 44 per cent are in favour



and the other 11 per cent are undecided. When you have such a divisive subject as this, to plow ahead without regard to the consequences, I think, is a huge mistake. If I tried to do that in business, I would be canned. I do not understand why we are doing this this way.

Thank you.

**Mr. Chairman:** Thank you very much, Mr. Turner. I think you have mirrored in much of what you have said a lot of frustration that people have felt, not only about how this agreement has come about but, indeed, other areas of, I suppose, public or political life where decisions are arrived at and where a great many people feel that the process has not allowed for their input.

I think what the committee wants to do and is going to try to do is to set its own time frame and pace. We have a great many people still to hear from and we will be hearing from them. When that is completed, we will try to sit down to reflect on what we have heard, to read the briefs that have been submitted from people who have not come before us and then to look at the whole accord in that light. I do not know where that is going to take us.

You were here this afternoon and sat through some of the other presentations, and you know the concerns at least of others who have raised some of the points that you have. Indeed, those have been raised on other occasions. I guess what is always hard, as I say to myself as an individual who happens to be a member of this Legislature, is that I would hope that as I deal with this issue—and, being a member of this committee and also a member of the Legislature, I have to; that is one of my responsibilities at this point in time—just because I am elected or because, for whatever reason, I am a member of a certain political party, none the less I am still living in my community, associating with my friends, talking to my family and to various people and trying to work my way through a lot of very complex issues. I appreciate that I at least have an opportunity, while here, perhaps to make some contribution or to have some impact in a way that is different from individual citizens.

I think it is awfully important that you have come forward because one of the things you have underlined is that our whole process becomes very suspect if people lose respect for it or if they feel there is no integrity to it. One of the things a number of us, and indeed people who have been before us, have all focused on is the process by which this accord has come to us; and secondly, whatever happens to this Meech Lake accord, how can we deal generally with constitutional

change so that people might in the end still not agree with what has happened but at least there has been a process put in place that is credible and is fair? If we do not, I think then your expression, your frustration, will in fact be that of the vast majority of Canadians and at that point, then, really our system of government will not function.

1640

I found it interesting that in the last American presidential election, I believe, for the first time fewer than 50 per cent of those eligible to vote voted. In Canada, to this point in time, we have a higher percentage who vote in federal elections, something around 70 to 75 per cent. In provincial elections in Ontario it is over 60 and higher in other provinces. I always see that as a measure, to a certain degree, of how people feel about the political system, the extent to which they feel they can trust the people who are participating in it.

I think we have to be very careful of that trust that individual citizens have with their government, with any government, whether it is Liberal, Conservative, New Democrat or something else. It does not matter. In listening to your comments, I think that is one of the things that I hear, which is a fundamental lack of faith, or a growing lack of faith, as you see it, in how our system is working in reflecting the views of ordinary citizens. That is something we have to remember very clearly because we can get caught up in the intricacies of some of these issues and sometimes forget about just what it is people do think about an issue of this kind.

**Miss Roberts:** If I might just make a brief comment, thank you very much for your presentation. Although you appear—all your bluster and everything—you certainly are a great Canadian, whether you want to put a hyphen in front of it or not. You have taken your time and energy to think this through and to come before us. So you still believe in the process, which gives me great hope, that someone like yourself, a private citizen, who cares so much for his family and for the development of Canada, would come here and express his concern.

My one question to you with respect to process is—we do not like what has happened in the past. There is no question about that. All of us seem to agree on that. The process that you envision I thought was very helpful, that we go back and talk about it. I assume when you said that, you considered talking about it at all levels, federally, provincially and outside of the electoral system itself. Is that correct?

**Mr. Turner:** That is correct. I think that any time you cook up a deal in the middle of the night and then you say it is a *fait accompli* and sign it and that is all there is to it, that is very, very wrong. If you were coming along with a new tax proposal or something of that nature, that could be changed in the next session of the House, or if you were coming along with a free trade agreement—which is going to be torn up—maybe. But when you are talking about the Constitution of the country, I do not think you fool around that quickly. I think you go back to the drawing boards and talk it out and make sure. Do not be throwing everything at your girlfriend trying to get her to come to the party. You are giving the store away. I just do not believe that is correct.

This agreement, as some of the people before me have said, is virtually carved in stone, and you are going to have to get the agreement of 10 provinces to change one sentence. That is wrong. There is something wrong there. In the United States, what do they require for the equal rights amendment—two thirds of the states or something of that nature? Is two thirds the amending formula? This is the only country in the world that is going down that road. We have gone down so many slippery slopes up to now, many of them things about which I disagree, but for that I am a bigot or a racist or something.

We are going down the wrong road here and we are going to pay for it; my grandsons are going to pay for this. It is not right; I do not like it. It is too rushed. If it is that much of a rush of a deal, it cannot be good. Or, as the old saying goes down at Eaton's, when I used to deal with Eaton's, the buyers were always told: "If you have any doubts, don't buy. If you have got one little doubt, don't buy."

We have got doubts. Do not buy it. You are giving the store away. Maybe you do not think so, but that is the way a lot of people feel. I can tell you we had a pretty exhaustive survey done by the National Citizens' Coalition, and it showed this is a very divisive thing. The government is rushing ahead saying: "We don't give a damn. We are going to do it anyhow." You know, they are only the government. They are our servants when it is election time. Let them stay servants now and reflect our views.

**Mr. Harris:** I think a number of us share your concerns with the process, and a number of witnesses have. I want to ask you something specifically, because you have brought up—

**Mr. Chairman:** Excuse me, Mr. Harris.

**Mr. Harris:** Should I speak into the microphone? Well, you may not want this on tape; I do not know.

**Mr. Breaugh:** You may not want this.

**Mr. Harris:** That is right.

No, I want to deal with the French question. Let us get right to the heart of the matter. I have read your letter to the Premier, where you talk about 20 per cent English in Quebec and the official language there is going to be French and the rest of the country is going to be bilingual. In discussing this with a number of people in my riding over my time in political life I have had this argument used many times. I would like to ask you, since the problem is Quebec being unilingually French and that is one of the reasons the rest of us should not be bilingual, would you then be supportive of the whole country being bilingual?

**Mr. Turner:** No. Personally, I have felt from the very beginning that this idea of the whole country being bilingual is a mistake. I have travelled a lot. I will guarantee you that I have travelled across this country on business more than most members in this room today. I have had occasion after occasion to see what is happening out there, and it does not work.

I was in Calgary when they had an airline strike and I could not get back. I went down and I bought a ticket at the railway station. I was lined up and this chap in front of me demanded a ticket—he wanted to buy a ticket to Montreal—and because the girl could not speak French, she got a strip torn off her backside by that gentleman. I use the word "gentleman" in quotes.

I have seen so many. I have got a young neighbour of mine. It does not work, let us face it; and down the road you are going to find, 10, 15, 20 years from now, it will not work. I have got a young former neighbour of mine who was living here in Toronto. He worked for an oil company which got sold to Petro-Canada and he was transferred to Calgary; a very bright young man, an engineer, moving up the ladder very nicely. He is fluently bilingual because he felt it was necessary for him. I was out to Calgary in October. I visited with him and he was downcast, demoralized that he was called in and told, "No further advancement." Jobs above him from now on are reserved for francophones—not bilingual people, francophones.

It is the same as right here in Metro. I walked in to get a bottle of booze last week, and the chap at the Liquor Control Board of Ontario in the Bayview Village Shopping Centre close to my home broke a bottle. I commiserated with him and he said, "Oh, well, it does not matter; I am out of job soon, anyhow." I said: "How is that? I mean, liquor board business is always going up."



He said: "Well, one of us has to go. Every Metro LCBO outlet in Toronto has to have a franco-phone within the next year, each store." I said, "Where are you going to get them from?" He says: "I understand that if they cannot get them, they will import them. I am the one who is selected to go." That is terrific.

**Mr. Harris:** Can I ask you, then, if you would not support the rest of the country being bilingual if Quebec is fully bilingual, would you then view that Quebec has the right to be French?

1650

**Mr. Turner:** I think they can speak any language they want down there; it is OK with me. Do not impose it on us.

**Mr. Harris:** Many francophones feel that the provisions of Meech Lake you object to will lead to that, to a French Quebec and an English Canada.

**Mr. Turner:** I do not know if it will or not, but I think Bill 101 certainly will. My brother-in-law lives in Montreal; his kids are gone. My sister lives in Montreal; her kids are gone. They are very bitter about it. The Anglo Alliance Québec is against Meech Lake, and this morning, according to the papers, French people outside Quebec have come out against it. Obviously, it is not the all-powerful popular thing across the country. More and more people are becoming disenchanted with it.

**Mr. Harris:** On this particular provision, I find your view and the view of l'Association canadienne-française de l'Ontario and the views of francophones outside Quebec and the view of the Alliance for the Preservation of English in Canada to be strange bedfellows. Do you understand that?

**Mr. Turner:** Yes. The French people do not like it because it does not promote French; it only preserves French. The English people in Quebec do not like it because they can see what is happening to them. I can see it when I go down there to visit my brother-in-law in Pointe-Claire. I can see it the way stuff comes in the mailbox.

They are not allowed to put those foodstore stuffers, those flyers in the newspapers. They have to deliver them by hand; otherwise, it breaks the law.

You can see it in so many things. You can see it in the kids not getting jobs and having to leave. We had a large family there, 32 on one side at one point. I think we had something like 21 on my father's side, my side. I guess there are five or six down there now, and it is only because they work in jobs where they have tenure, so to speak, and cannot get booted out.

I hired people down there and I went through the whole process. I always wound up getting somebody who was French because the English guy who spoke English and French and who was perfectly bilingual was not acceptable at the retail stores when he went in to make his pitch. It was as simple as that. It is cold; it is bare; it is stark; but it is the language of the street and what is happening out there. It is not in this cosy little room. That is what is happening. They are not going to change anything. They have it their way. With this thing, they are going to have it even more their way.

I do not know. When I was in Ottawa, I guarantee you a human rights commission would like to hear what I did to them. I would be up there like Johnny Quick.

**Mr. Chairman:** Mr. Allen with a final question.

**Mr. Allen:** It was essentially my question that Mr. Harris asked, Mr. Chairman.

**Mr. Chairman:** Mr. Turner, again I thank you for joining us this afternoon. I am sorry we were late in getting started, but we do appreciate your frankness and your coming here this afternoon.

Tomorrow the committee will be meeting in room 151. There are just a couple of brief procedural things if we can go in camera.

The committee continued in camera at 4:55 p.m.

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Offer, Steven (Mississauga North L)

**Substitution:**

..... Keyes, Kenneth A. (Kingston and The Islands L) for Mr. Morin

**Clerk:** Deller, Deborah

**Witnesses:**

**Individual Presentations:**

Orenstein, Ian

Silver Dranoff, Linda, Legal Counsel, Linda S. Dranoff and Associates

**From the Ontario Metis and Aboriginal Association:**

Recollet, Charles, President

Reid, Chris, Constitutional Legal Counsel

**Individual Presentation:**

Latrémouille, Claude

**From the Disabled Women's Network of Toronto:**

Stimpson, Elizabeth, Chair

Wood, Sharon, Assistant to the Chair

Popkey, Carol



**From B'nai Brith Women of Canada:**

Feldman, Hannah, Public Affairs Chairman

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**From Brantford Ethnoculturefest:**

Bucci, Vince, President

Jenkins, Rita Marie, Acting Executive Director

**Individual Presentation:**

Turner, E. A.









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# **Hansard**

## **Official Report of Debates**

### **Legislative Assembly of Ontario**

**Select Committee on Constitutional Reform**  
1987 Constitutional Accord

**First Session, 34th Parliament**  
Wednesday, March 9, 1988

Speaker: Honourable Hugh A. Edighoffer  
Clerk of the House: Claude L. DesRosiers

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# LEGISLATIVE ASSEMBLY OF ONTARIO

## SELECT COMMITTEE ON CONSTITUTIONAL REFORM

Wednesday, March 9, 1988

The committee met at 10:06 a.m. in room 151.

### 1987 CONSTITUTIONAL ACCORD

(continued)

**Mr. Chairman:** Good morning, ladies and gentlemen. If we can begin our session today, I would invite Professor Roman March of McMaster University, the department of political science, to please come forward and take a chair. That is fine. We want to welcome you this morning. You have made your way from Hamilton, as one of our committee members does every day, exploring the wonders of the Queen Elizabeth Way.

We have received a copy of your presentation. Would you lead us through it, however you would like, then we will follow it up with questions.

### DR. ROMAN MARCH

**Dr. March:** Thank you very much for your remarks and I thank the members of the committee for being here to hear what I have to say. Essentially what I am arguing in this brief is I begin by saying what Meech Lake is not about. The opening remarks and paragraphs are addressed to many of the other people who made presentations and so on. What I also try to do is put the accord in some historical perspective.

By the way, I should identify myself. I have been a professor of political science at McMaster University since 1968. I have been involved in constitutional law, teaching matters of it, not formally in a law school, but through my regular courses. I also teach an honours course, and have taught since 1968 on Quebec politics. In fact, I dismissed my Quebec politics class this morning in order to appear here.

**Mr. Chairman:** You should have brought them down.

**Dr. March:** I am not sure that is a good point.

The point I am trying to make about the Meech Lake accord is that it is not about all these other matters; it is not about property rights or women's rights or aboriginal rights. Other constitutional conferences and other accords can deal with those. For the moment, we have here what I would call a minimal requirement. That requirement essentially, which is met by the

Meech Lake accord, is to reintegrate Quebec into the constitutional process.

I argue in the paper that, for a variety of reasons, until Quebec formally adheres to the entire 1987 accord and to the 1982 accord or agreements—the Constitutional Act of April 17, 1982—Quebec will continue to act as it has; simply either refusing to participate or exercising an informal veto over the entire constitutional process. My argument is that there are historical reasons why Quebec has to be very upset about its present anomalous position within the Constitution. I further argue that until there is agreement among all the provinces, the federal government and the federal Parliament to the Meech Lake agreement, Quebec will continue to act in a very negative way as it has been. All these other special interest groups—with their own agenda and their own rights to speak for their groups and members—must realize that until such time as there is agreement and support by all the provinces and the federal government for the Meech Lake accord, there will be no progress in any of these other matters. It is as simple as that.

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That is a political statement rather than a constitutional one and it stems from 20 years of teaching Quebec politics, trying to understand, as I point out, the anomalous position in which Quebec is at the moment and the fact there are questions even of honour and integrity that are involved. I make the argument in the paper briefly that had Ontario, for example, been in the position of the Quebec government in 1981-82, the 1982 Constitutional Act would not have been passed. It simply would not have been passed. The other provinces would not have agreed.

I cite Stanfield on this and several other people on the process. There are a host of them who have testified at least to the federal Parliament about the invidious situation in which Quebec was placed by governments engaging in a public process. There is nothing wrong. In principle, I support openness in government. I have written a book on that matter. But because of what transpired in 1982, Quebec and the other governments have in effect been forced by the failure of the 1982 accord to engage in executive federalism. Some people call it secret federalism.



It is unfortunate perhaps that the principle of executive federalism may or may not have been enshrined in the Meech Lake, but has been entered, but that is a minor point. The key point is that when one raises the question of the honour and integrity of any government of Quebec in this process, then those are the important things. That is the important question. Unfortunately, the process required that these negotiations and so on be conducted, in terms of executive federalism, in secret.

It would be a very dangerous thing for the long-term political stability of this country for any government that has adhered to the Meech Lake accord, or agreed, or was part of the process, to now renege on it. We could argue that they should have simply not required unanimity of all the provinces. One could argue that perhaps that was not required. But had there not been the requirement of unanimity, then exactly what is transpiring now would be happening.

Individual governments are under intense pressure from what I call these individuals or interest groups speaking for a particular segment of Canadian society. The first ministers who engaged in the process were quite aware that they would be under this intense pressure—they had been through it before—and that had they adhered to the 1982 amending formula of seven or two thirds of the provinces constituting 50 per cent of the population, it would be sufficient to pass an amendment. They agreed that they must stand firm.

I agree with that. That is not a constitutional requirement, but it was a political requirement. I urge the Ontario government not, at this stage, to break that agreement because, should this happen, we will be back where we were in 1971 with the Victoria charter. It will be at least a decade, and perhaps two decades, before any government in Quebec would agree to re-engage in this process.

So I am pointing out that at the present moment we are at a constitutional impasse, and Ontario would do exactly what Quebec is doing now, which is to say: "We are not part of the process. We did not agree. You people sabotaged. The rest of the provinces ganged up on us"—I use those words in quotes, and so on—"and therefore we, out of sheer political necessity, must not agree to any further constitutional amendments." That is exactly how Quebec is acting, and has acted since 1982, and will continue to act in that fashion if the political pact is broken. That is contained in my brief.

I look at various other parts of the agreement and just point out that in essence it is innocuous. Most of the other proposals are quite innocuous, and the cries or the concerns of others who argue that the effect of the various proposals is to destroy federalism or weaken federalism are not well placed.

I see that Mr. Keyes has a question.

**Mr. Chairman:** If you have completed your—

**Mr. Keyes:** No, I will just wait. I was letting him know—

**Dr. March:** I prefer to answer questions. I could talk for three hours nonstop. That is why I am a professor.

**Mr. Chairman:** It is the manner by which members are recognized. So if you see hands going up, you do not have to stop.

**Mr. Keyes:** It is just to get my spot in the speaking order.

**Dr. March:** All right.

**Mr. Chairman:** If you would like to complete your opening comments and then we will—

**Dr. March:** There are many things that are addressed. The five points are addressed in here, but just to point out how innocuous some of the other proposals are—for example, the Senate and the Supreme Court having the provinces nominate members—I point out that in another federal system, the FRG, the Federal Republic of Germany, where they also have the federal system, when it comes to what they call their constitutional court, the process is quite straightforward and it far more involves the legislative bodies.

There, the members of the constitutional court are elected by the two legislative bodies. One legislative body is the federal body and the other one, which is the Bundesrat, which is the equivalent of our Senate, is composed of primarily ministers from the Lander. The Lander are equivalent to our provinces, and they elect the other half. So in effect, half the members of the constitutional court, or the supreme court of West Germany, are elected by the two legislative bodies.

All we are suggesting or has been suggested in Meech Lake is that the provinces will nominate. But it is clear that the Prime Minister is not bound to accept those nominated. So I use the word "innocuous." These are trivial.

What of course is not, if one looks at Meech Lake carefully, is the fact that at the next meeting, perhaps this year, there will be a very extensive examination of the Senate in its entirety. We may end up with an election and so

on. We should not be surprised to see a very formal, massive document dealing with the entire Senate. So I am just saying many of the proposals are innocuous.

I invite questions.

**Mr. Chairman:** Thank you very much. As you have noted, we have a copy of your full submission which we can refer to later, as well. I have Mr. Keyes.

**Mr. Keyes:** It is enjoyable to quickly scan through your presentation, but it leaves a question in my mind with which I want some help from you.

As we look at the presentations that I have had a chance to read—and I am only on my second day on the committee, so I have the ignorance the other people are not blessed with—the academics who look at it analyse the document and basically say, “It is a good document and it does what we need to achieve.” On the other side, we get all the interest groups who come, who represent the handicapped, the native people, women’s groups, and all of these, and they all say, “It is a horrible document because it is taking away our rights.”

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To me, it says that we have a dilemma. Probably if we had listened to academics who analyse these things—and having been one myself for some years, I tend to side with them—we would say, “Yes, it is a good agreement, because they are analysing it in the context of history, so they can look back and compare it to 100 years ago, or whatever, whereas the groups who look at it perhaps look at it more in the present as to what they seem to see they are losing.”

My dilemma is how do we get to the public the message that the agreement should be looked at in the first instance for what it was designed to achieve, and that is to bring Quebec fully into Confederation. Once that has been achieved, we then start dealing with the other concerns that are there.

Is it possible that the amendment that came before us went a little bit too far in attempting to achieve the major objective of bringing Quebec into Confederation, and by going as far as it did in how we elect the Senate and who would have input into it and the Supreme Court and a few of the other issues, it then triggered some of the other concerns? Had it been less of a document, would it perhaps have achieved the goal for which it was intended without sparking these other ones?

So there are two questions in there. The main one is how do we, as a province, as a committee,

get the message to the public on this side that, “Let us do the one thing first and then we can carry on with these others afterwards.”

**Dr. March:** There are two major points there. One is about the publicity thing. I, in my own tiny, little way by appearing here before the committee, am trying to establish this on the record and so on. Whether we will achieve any publicity is another matter. I am no expert in communications in that area.

I understand the dilemma. That is why we have representative government. The Legislature must make up its mind. The individual members, through their caucuses and so on, must assert themselves on behalf of the people. We academics then are free to be philosophical. That is about all we can contribute, I suppose.

On the other part, one can understand why the interest groups—I do not use that word pejoratively at all—have to focus and rightly so. Of course you understand that they focus on those aspects of the Meech Lake agreement which do alter the relative powers of the federal system with respect to programs. As soon as we get into that, we get into the area of sections 91 and 92, which are not even touched by Meech Lake. But somehow or other, the implication of these interest groups is that somehow Meech Lake touches on sections 91 and 92, the distribution of powers between the federal and the provincial governments.

If you look at the history of the Constitution, particularly in the 20th century and particularly since the Second World War, the federal government has massively moved into areas which are clearly not within its competence, and Meech Lake does not address that. That will have to be addressed. However, as part of the negotiation process, the other provinces—in negotiating with Quebec through Senator Lowell Murray who was the key operative here on behalf of the federal government—had to have their pound of flesh. Right?

It is incredible that somehow or other in the future, as part of the constitutional agreement, there are fish. We all eat fish, but what are they doing in the Meech Lake thing? We know why; it is because the Premier of Newfoundland demanded that this be on the agenda. So the process is not just to bring Quebec in, but other provincial premiers had their particular interests incorporated in the document. Actually the fact that fish are in there is embarrassing to me, and I do not mind being quoted on that. It is embarrassing that they are in there. However, the western provinces have their triple-E senate on the agenda. So in order to agree to the linguistic provisions of the



Meech Lake agreement, and to agree to incorporate the idea of the distinct society for Quebec, the western provinces demanded a discussion of the Senate be in the Meech Lake agreement.

As I say, the proposals in the document are very innocuous; however, it stipulates that in the future, meaning 1988 or 1989, there will be a full discussion of the Senate. So we have a series of tradeoffs here. I will leave it at that.

**Mr. Chairman:** I might note that I have Mr. Allen, Mr. Harris, Mr. Elliot, Mr. Breugh and Mr. Offer. I would just remind committee members that I think we are going to have a very interesting and full morning, and we could keep that in mind as we provide our questions. With that, I will move on to Mr. Allen.

**Mr. Allen:** Professor March, either you trailed me or I trailed you down the Queen Elizabeth Way this morning. We both got here on time, which is amazing. That must be some kind of record.

First of all, you made some very brief comments in passing about the process and about executive federalism. In your review of Canadian constitutional amending processes, where does this one rank? It ranks in another sense for some people as a rather unhappy kind of process, one that was very hasty, like a collective bargaining session that had to get done at the end of the collective agreement, which is already overdue for two years, etc.

You went through the smoke-filled room, the dark night hours, the coffee and the doughnuts and the routine, and you sort of got there with something at the end of it, but that left the impression across the country that a lot of things were thrown in rather hastily, the tradeoffs were ill-considered and so on. Is that a process that really is tolerable for us in the future?

**Dr. March:** There seems to be a misapprehension about the process. I know the press has covered it that way and, of course, we only know what we read in the papers, I presume, or see on television.

The process—I have mentioned very briefly; one sentence in my brief—began almost immediately, on September 4, 1984, on the day of the election. Immediately, Senator Lowell Murray was delegated by the Prime Minister as, in effect, an envoy between the provinces, and there was continuous negotiation between the provinces for at least two years prior to Meech Lake. Now again, these were not public, and therefore the federal and other governments participating have paid the price, because when you conduct things in secret, that leads to apprehension and so on.

Whether it is on local council in Hamilton or at the highest levels of government, secret diplomacy, secret negotiations raise apprehensions.

Therefore, I say it is an unfortunate process but, given the context of what is trying to be achieved, one can understand. I say it is unfortunate, but it seems it is going to continue that way. Therefore, one should look at opening up the process. But those are not addressed in any way whatsoever in the agreement. I deplore the process but I understand it.

**Mr. Allen:** What is the best point at which public participation and the insertion of the legislative process should take place in constitutional-amendment activity of this kind? Clearly, we have locked ourselves in, perhaps in an unfortunate way, because there is a sense, I think, among many people that this could be improved, even though you say some aspects of the amendments are innocuous.

There are some points that are quite clear where the statement could have been somewhat more reassuring and could have been a bit more inclusive of some groups in the community; the language could have been better at some points; there is some ambiguity that ought to be cleared up, at least one statement of fact that is out of order, and so on.

One senses that it would be better if there were a space in which there was fairly open legislative consideration and hearings and if the first ministers then went back into session to tidy up before they got themselves totally committed to a package. Is that workable in constitutional discussion of this kind? Are there downsides to that, or is that the way it ought to happen?

**Dr. March:** Academics have traced and others have traced the process in Canada for which I use the term "executive federalism." It is a neutral, nonpejorative term, but in essence it means that the constitutional negotiations are carried out as though we are dealing—I use the word "diplomacy" because the process is one of treaty negotiations between sovereign provinces and the federal government. The legislatures are deliberately excluded from this.

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This goes right back to 1867 and to the even earlier colonial period where it is seen under the parliamentary system, particularly the British parliamentary system, that these kinds of negotiations—which, in effect, are almost diplomatic because under the Constitution the provinces have virtual equality, equal status—stem from the prerogative of the crown. Then we get into some very heavy constitutional issues.

This is an ongoing tradition in British parliamentary systems. Constitutional issues are not referred to the Legislature until after they have been concluded and are a pact. The provincial and federal executives have the attitude that these are not negotiable, not subject to amendment. This is a very unfortunate process. It is not a necessary—it could be changed—but that would have to involve some very fundamental changes in the nature of parliamentary systems in Canada at both levels.

**Mr. Allen:** Just a last quick question, and then I will yield the floor. Is the implication of what you are saying that in fact we are dealing with 11 equal governments in Canada? That, certainly, I think, is not the only interpretation of what happened in 1867. There was not equal authority devolved in that sense upon both the federal government and the provinces. Have we, over time, become in effect a nation of 11 principalities that really are dealing as equals regardless of the national-federal as against the provincial domain?

**Dr. March:** There has been an evolution, change and so on. This development of executive federalism is really something that has emerged over the last two decades. One literally can go back to the Victoria charter in which the provinces and the federal government agreed to set provisions and the Quebec government felt constrained. This is very paradoxical, but the same Mr. Bourassa who adheres to Meech Lake was the one who scuttled the Victoria charter. Really, that was the test. In effect, they exercised a veto. That unilateral veto by Quebec, having been signed and agreed, was accepted by the other provinces.

One could almost say at that point then the principle, which was not enshrined in the Constitution at that time, was accepted that this would happen. Of course, Quebec has adhered to that precedent since 1982: We did not sign; we did not agree; we were, for whatever reason, sandbagged and, consequently, we are not going to participate in the process and we will sabotage the process. I use the words "constitutional impasse," but behind that are all these other things I have said.

We have got to get out of that or else there will be no progress for these other groups. When I call them special interest groups, they have very legitimate concerns, some stemming from Meech Lake perhaps, but I think they are being alarmist in that sense.

I also argue with respect to language that the nature of the federal system is changing substan-

tially. We are in effect moving towards a community of communities. Now, this may be undesirable, but that is where we are going. If that is the case, then it is going to be very difficult to have, as other people have correctly pointed out, national programs, universal programs and so on. All those concerns are there, but they are subordinate. My argument is that at this moment they are subordinate to the more important thing of getting Quebec back in.

Another point is that all these things are subject to future negotiation. They are just going to be a bit tougher because now you are moving towards the state of the 1982 amendment formula of seven provinces representing 50 per cent of the population to, in many areas, a requirement of unanimity. That is unfortunate, but it is enshrining the very thing we talked about, that 10 provinces and the federal government negotiate on an equal basis.

That is worrisome for those who want to see a strong national government or even stronger. No doubt that is a legitimate concern, but Meech Lake has been part of a much longer process of evolution in which we have been evolving in that area. We even have a book published called *Federal-Provincial Diplomacy*, which in 600 pages states what I have just said in two or three minutes.

**Mr. Harris:** I will be very brief. On page 10 of your brief, you talk about the language rights of Quebec versus individual charter rights. You indicate that the way you interpret it is that this is indeed so, that Quebec collective language rights would take precedence over individual charter rights, aside from the fact that you say that if this were not so, there would be a whole bunch of lawyers and political scientists unemployed, which is attractive to many of us.

Leaving that aside, could you give me an example or two of the type of charter rights that could be overridden by the language rights of somebody living in Quebec?

**Dr. March:** The connection between Meech Lake and the distinct society and this question of the charter rights—the linguistic rights of the English community in Quebec cannot be overridden by the Meech Lake agreement as such, particularly education rights. However, the Parti québécois government's first legislative bill, Bill 101, which I used to call the 401, contains 215 sections, many of which infringe on linguistic rights. Had there been a Charter of Rights, clearly the courts could have overturned many more provisions of Bill 101. Of course, the English-language community is still fighting



through Alliance Québec for the preservation of its linguistic rights, and most of those clashes are over individual rights rather than community rights.

I express in here that the nature of legislation and the nature of government is such that we are constantly having to assert collective rights, and these quite often and normally and usually infringe on individual rights. We are a community or a series of communities. Through our representative governments we grant rights to citizens, we expand rights, but we also limit rights.

In this sense, the absolute right of the Quebec government to protect the francophone majority's rights is asserted in Meech Lake. If this will limit some individual aspects, my right as a professor to teach in a Quebec university in English only or—my French is not bad—but anyway those things may be limited by some contractual agreement or they could be imposed by the Legislature. That then would limit my individual right, your individual right or somebody else's.

For example, there is the very famous case of the nurse who was functionally bilingual but, somehow or other, could not pass some test put by the language commissioner of Quebec and she lost her job. She had doctors and everybody attesting that she was perfectly able to do her nursing in French or English, but somehow she could not pass the test. The test was a legitimate legal test, she failed it and the government had to enforce it. In that way, her rights somehow were limited because it was a requirement that she be able to function both in French and English, but primarily in French, and she could not meet the test.

The charter cannot protect things like that. Just as in Ontario, we could demand, as we do, of people who wish to be hired by the Ontario government that they have competency in English. If they cannot meet that test, however that test is defined and whoever administers it, then they cannot be employed.

What Meech Lake does is reaffirm the right of the government of Quebec in almost all areas of society and work to insist that people be able to function in French. I have heard many people deplore this but, historically, this is the absolute requirement that any Quebec government must have.

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**Mr. Harris:** I understand but I disagree. I think in Ontario that if somebody was rejected because he could not speak English, you would

have to demonstrate that speaking English was important to the function of that job. That is why he was not hired, not because he could not speak English.

**Dr. March:** All right. My assumption in making the point was that it was a requirement because it was a publicly funded hospital and the requirement was that you be able to function in French. We certainly could make that a general requirement because you are dealing with the public. Perhaps if you were just sitting and pushing paper, that might not be so important.

**Mr. Harris:** You can push it in any language.

**Dr. March:** I do not know if that answers your question.

**Mr. Chairman:** Mr. Cordiano with a brief supplementary.

**Mr. Cordiano:** I think I will pass, Mr. Chairman. It will not be brief. I just wanted to make the point that Bill 101 is before the courts now. It is not very clear how the courts will decide on the question of language, but I think also—

**Mr. Chairman:** That is an interesting brief supplementary comment, and we will move to Mr. Elliot.

**Mr. Cordiano:** I told you it would not be brief. I tried.

**Dr. March:** Mr. Chairman, just quickly, there are 215 sections to the bill. Only five have been before the courts. Meech Lake will not—

**Mr. Cordiano:** But the case is before the courts now.

**Dr. March:** Yes. There are about five sections that have been challenged.

**Mr. Elliot:** My question is sort of a supplementary too, only it has to do with section 28 of the charter and it has to do with page 10 of your submission. To get a flavour of the opinion, I would like you to share with us, if you would, what you mean when you say "the collective language rights of the francophone community in Quebec take precedence over individual charter rights if these come into conflict."

It seems to me, as the hearings have developed, we have had a number of experts in front of us and a lot of interest groups in front of us at this point of time. There seems to be a fairly clear understanding in the minds of most of the people who have witnessed in front of us that there is a Constitution that has been in front of us for a rather limited length of time and a charter that has been there since 1982 and we are now considering an amendment. It seems to me that all three of

these documents should be considered in tandem. I am wondering if that statement of yours on page 10 has anything to do with overriding section 28 in your opinion of the charter.

**Dr. March:** That is a pertinent question. First of all, my assertion here is simply my interpretation. I am well aware, just as you are and other members are—I have gone through all the briefs. One of the nice things about being a professor is that you are paid to read things that other people are saying but nobody else has time to read, or very little time.

That is my interpretation, despite what the Prime Minister has said and despite what Senator Lowell Murray has said. I look at the clear words. I have appeared before the Supreme Court of Ontario on the constitutional reference case. As I said, I have been in this area 20 years. In this instance, I do not believe what the Prime Minister says on this. I think the courts, through the initial interpretation clause, which requires them to think of Quebec as a distinct society, are in effect asserting a principle of collectivity, of collective rights and of the responsibility and the right—not just the responsibility but the absolute right of the Quebec government to proceed with Bill 101 and any other further amendments.

I know that Professor Lederman and others have taken a very sanguine position on this, saying that there is nothing to worry about, that these are alarmist positions. I have to say that I am not alarmed when I say there will be an assertion by the Quebec government of its right to expand the French language in Quebec. It seems strange but there are still restrictions, not so much constitutional as what one calls sociological-societal. It has to be aggressive.

I take the position that if I were to live in Quebec, I would have to function fully in French. The Quebec government, not necessarily the Bourassa government but some future government, may and is likely to proceed much further, with much more hardship. Some of the things in Bill 101 are absurd—the restriction that no merchant or person can put up a sign in English as well as French, that it must be in French only. That is absurd; that is paranoia on the part of the government. It should be struck down on that basis, more for its absurdity rather than its constitutionality.

I am trying to be brief on that.

**Mr. Chairman:** Professor March, I want to thank you very much for joining with us this morning. I should note your reference about the unemployment of lawyers and political scientists. Yesterday we were talking about getting rid

of provinces. To a number of people in this room, that might be perhaps the best thing for constitutional evolution and amendment.

We thank you for your paper. In particular, I think the discussion as it relates to collective rights and the relationship to the charter has been an interesting one which has been touched on to some extent, but I think not in the way or the detail you have today. We thank you very much for coming here today.

**Dr. March:** I thank the members of the committee, Mr. Chairman, for hearing me. May I sit back and follow the proceedings?

**Mr. Chairman:** Certainly.

**Mr. Cordiano:** No charge.

Interjections.

**Mr. Chairman:** Perhaps I might ask Al Johnson to come forward and take a seat. Mr. Johnson, I know that at the present time you are at the University of Toronto in the department of political science, but I wonder if I might ask you to further identify the various things you have been involved in over a long career in public service. I know I would miss a number of things. Many on the committee do know the role you have played, but I think it would be useful for us prior to beginning your presentation. We welcome you here today.

AL JOHNSON

**Mr. Johnson:** Thank you very much, Mr. Chairman, and honourable members. I appreciate the occasion to talk to you today and I thank you for that invitation. Where I am coming from obviously affects what I am going to be saying so perhaps I should come clean with you.

I have been involved in federal-provincial relations for a very long time. For 10 years, while I was Deputy Provincial Treasurer in Saskatchewan, I was that province's member on something that was called the Federal-Provincial Continuing Committee on Fiscal and Economic Matters. It had a lot of influence, but a very long title.

Then I moved to the government of Canada. I was Assistant Deputy Minister of Finance in charge of federal-provincial relations for a four-year period. That was the time when we developed the equalization formula, the formulation which made possible medicare, the introduction of principles into the legislation, the post-secondary-education financing formula and some other things.

I then became involved in the first constitutional reviews. I am inclined to call it 1968-71. I did not stay through to the Victoria conference



but I was involved in the preparation of some of the working papers that the government of Canada presented at the meetings which considered the distribution of powers.

Later on, in 1973-75, somewhere around there, I was Deputy Minister of National Health and Welfare and was involved in the federal-provincial social security review which, of course, had a lot to do with federal-provincial programs, social services, guaranteed annual income.

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That is where I am coming from. Obviously, I have been influenced in what I am about to say by that background. My starting point on Meech Lake is to look to its ultimate purpose. Quite clearly, its objective is to strengthen the bonds of nationhood between Quebec and the rest of Canada. That surely means to me that they are talking about the bonds of nationhood felt by the people of Quebec because this, after all, is the source of a sense of nationhood within Quebec.

The constitutional accord, however, does not deal with the bonds of nationhood in terms of citizens; it deals with them in terms of governments. The question therefore is whether the arrangements between governments embodied in Meech Lake contribute anything or much to the strengthening of the bonds of nationhood which are felt by the people of Quebec.

My answer is no, and I am going to spend some time telling you why my answer is no, working from the submission you have. The reason I say this is that in my judgement two bonds of nationhood have been weakened. The first of these is the shared right of Canadians to certain common public services—common programs like medicare, unemployment insurance, old age security, the Canada pension plan. Meech Lake seriously weakens the power of Parliament to establish such programs in the future.

The second of the bonds of nationhood which has been weakened in my judgement is the recognition by Canadians and respect for the national institutions. Meech Lake has weakened the national government in favour of the provincial governments, and in doing so I think in the longer term will weaken the relevance of the Parliament of Canada.

I am not going to be speaking, as you can see, to all the elements of the Meech Lake accord. I am going to be speaking essentially to two of them. One has to do with the establishment of national programs either by way of an amendment to the Constitution giving to the national

government the power to establish certain programs, or amendment to the sections having to do with provincial powers, with shared-cost programs and the amending power. The second part I am going to be dealing with is national institutions, having to do with federal-provincial conferences, the Senate and perhaps a glancing reference to the Supreme Court.

Starting with the national programs, I remind you—not that you need reminding—that nearly all the national shared public services are the result either of a constitutional amendment or of the use of the spending power.

Examples of constitutional amendment: There was unemployment insurance, the constitutional amendment of 1941. There was old age security. When introduced in 1951, the Prime Minister of Canada, Mr. St. Laurent, believed a constitutional amendment was necessary. There were advisers in the government at that time, I am assured, who believed that the spending power would have sufficed, but he himself wanted a constitutional amendment and that was forthcoming. Then when the Canada pension plan and the Quebec pension plan were being introduced there was a further amendment so as to make possible the introduction of disability benefits in the Canada pension plan.

Examples of the spending power are obvious to you all. There was the old age pension back in—was it 1927? I found myself wondering this morning exactly what year it was—moving towards old age security and the guaranteed income supplement; disabled persons' allowance, blind persons' allowance, unemployment assistance merging together into the Canada assistance plan; post-secondary-education arrangements; and, of course, hospitalization in 1958 and medicare in 1968.

Meech Lake weakens both of these powers, amending and spending, by providing that the provincial governments may under certain circumstances opt out of either constitutional amendments or new federal-provincial, shared-cost programs. We all know what "opt out" means, that even though you are a nonparticipating province you will be compensated as if you were a participating province.

I do not need to say to you that the opting-out idea has been on the constitutional table and the federal-provincial table for a very long time. It began shortly after Mr. Lesage was elected in 1960. The notion of opting out really was pressed right straight through until the mid-1970s and then it took a rather different course. Instead of opting out progressively from federal-provincial

programs and from constitutional amendments, which would give the government of Quebec more power than the other provincial governments and the federal government less power, the process was reversed in the eyes of the Parti québécois and the argument was, "We will start by separating and then we will reassociate, souveraineté-association, and we will end up in a position that will be even better than special status." When the referendum was defeated, we were essentially back to the special-status argument and the special-status argument turns on opting out.

Let me talk to the spending power. This is a long-established power. Not all of my academic colleagues apparently agree with me, but in 1937, as you well know, there was the reference regarding the Employment and Social Insurance Act. The judicial committee of the Privy Council was quite clear: "The Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public institutions." Of course, the proviso is provided the arrangements are not so detailed as to be tantamount to legislation.

In constitutional practice since, I think it is instructive that the provincial governments have never challenged the federal spending power in the courts. There is currently the *Winterhaven Stables* case which said the same thing as did the 1937 case, but that is under appeal. Besides, I am not a constitutional lawyer so I am not going to try to outguess any of the constitutional experts.

I say next that Meech Lake provides, however, that the provinces could now opt out with full compensation provided there is a provincial initiative or program which is compatible with the national objectives of the federal statute. That is not as innocent as it sounds. This notion of "compatible" is very different from the practices of the past. I will not go all the way back into the past, but medicare was clearly based upon the incorporation in the national statute of certain principles which were to be achieved, and the provincial governments would be reimbursed for their medicare programs provided they adhered to those principles.

It is important to recognize that the word "principles" became a part of the vocabulary of federal-provincial relations. Formerly, of course, we had shared-cost agreements. These were created by a national statute and by provincial statutes and it was under those statutes that a conditional grant agreement was entered

into between the two orders of government, and those conditional grant agreements contained the conditions.

In 1960, Mr. Lesage had said, "We will never sign a shared-cost agreement again." Those of us who were involved had to find a formulation which would not require Mr. Lesage to sign an agreement. The answer was the incorporation into the statute of "principles," and of course this word in the vocabulary of federal-provincial relations has been evident right straight through to and including the Canada Health Act.

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Meech Lake did not use the word "principle." Meech lake used the word "objective," and "objective" is different from "principle." "Objective" is the "object of an action." A "principle" is a "fundamental attribute, an essential characteristic."

More than that there is the word "compatible." The government of Canada will reimburse the provinces providing they have a "program or initiative that is compatible with the national objectives." The word "compatible," what does it mean? In English, of course, it means "capable of existing alongside of" or it can mean "accordant, consistent, congruous." In French, however, "compatible" means only "capable of existing alongside of."

What it comes down to is that Meech Lake says a province may opt out simply by having a program or initiative which is capable of living alongside of something called a "national objective." In effect, I am suggesting to you that the fathers of Meech Lake deliberately decided not to use the word "principle" and chose a vaguer word. I cannot, of course, attest to that in personal terms.

Let me say something about the amending power now. The Constitution Act, 1982, provided that sections 91 and 92 could be amended with the assent of seven provinces representing a majority of Canadians, with the proviso that where the amendments involved culture or education a dissenting provincial government, one which dissented and continued to dissent from the amendment, was entitled to full compensation from the government of Canada.

Meech Lake extends this opting-out principle to any amendment to the provincial powers, which really means—I am speaking as if I were a Deputy Provincial Treasurer still—that a provincial government has an incentive to try to be one of the three dissenting provinces. That is a little bit of a complicated checker game in federal-provincial relations, but there is an incentive to



that. I just loved getting cheques for nothing. It was a whole lot easier to deal with reallocations, with cheques with no conditions, than to impose taxes.

**Mr. Breaugh:** I know the feeling.

**Mr. Johnson:** You guys know it better than I do. You have to get elected.

There is a disincentive for the government of Canada to even embark upon this rather tortuous road. Some people have said to me, "Does this really matter, this Meech Lake provision concerning the amending power, or for that matter the spending power? I say, "Perhaps we should ask ourselves whether we, as citizens, are better off as a result of the Meech Lake provisions?" Maybe that is the fundamental question. Are we, as citizens, going to be better off in the future?

An even more instructive question it seems to me would be this one. "Would you, the fathers of Meech Lake, have been prepared to make your provisions concerning national programs retroactive? Would you have been willing to make them retroactive?" Which is to say that medicare would be ruled out, hospitalization would be ruled out, the Canada assistance plan would be ruled out, etc.

Even looking ahead prospectively, there is the question of how we are going to go about the difficult question of creating new rights and benefits of nationhood for the citizens of Canada in programs such as home services for the old and disabled. I can say this, I have white hair. This is going to be a real issue for every treasury in the country. We are going to have to find a way of solving it. We have a problem right now on what is child care. I am glad I am not involved in trying to define the shared-cost arrangements or whatever they are going to be in respect of child care. There is legal aid, legal services in a more litigious society. All right; enough. That is what I have to say about national programs.

Let me talk about national institutions for five minutes. My generalization is that Meech Lake means that the elected institutions of the national government will be limited or constrained in the exercise of their powers by empowering the provincial governments or their delegates to interpose their views at strategic points in the national or federal decision-making process. This is accomplished essentially in three steps:

Step 1: You constitutionalize the federal-provincial conference of first ministers. That is innocent-looking enough. The conference of first ministers already exercises a great deal of power, particularly when their conferences are televised. I think Meech Lake should have dealt with the

question of televising first ministers' conferences. Ask an elected member of Parliament whether he thinks he has as much power as the first ministers in the face of the new institution of the televised federal-provincial conferences. I would say he would say "checkmate" to the elected House of Commons.

Step 2: You transform the Senate into a House of provincial delegates. The Senate is effectively nominated, obviously, by the provincial premiers. Second-Meech Lake does not say this, but this is quite clear—the Senate retains full veto over the government of Canada and over House of Commons legislation, and Meech Lake legitimizes, or at least partially legitimizes, an appointed Senate by turning it into rather a more "representative" body in respect of the provinces.

Now, is it drawing too long a bow to suggest that if I were a Premier I would know, when I was dissenting from some proposition the government of Canada was advancing at a federal-provincial conference and I could not win there, that I might be able to say, particularly if I were Premier of Ontario: "You know, we can always go about this a slightly different way. We have a House of provincial delegates, and your propositions can be defeated there." That is another kind of checkmate to the government of Canada, the elected House of Commons; and a checkmate to the electorate, because the Senate is not going to be elected. We have a double majority, the House of Commons and the Senate, and we have also created a situation where we cannot have an elected Senate.

I want to conclude on a very personal note. I am a Saskatchewanian. I have known from the time of my first political consciousness that we had no power in Ottawa. We have 14 seats in the House of Commons out of 282, and we do not have a much better representation in the Senate; which does not matter anyway, it is appointed. I mean it does not matter now.

I learned all the mythology of the west as a boy: hate the east, hate Toronto, hate the railways, hate the banks, hate the elevator companies. Do you want more? You know it all. It is all very well, but this mythology finds its roots in powerlessness. It seems to me that we have the choice in this country of addressing ourselves either to the mythology or to the roots of the mythology. I do not think the mythology is going to go away until we address its roots. I think in this country it is profoundly important to address the roots of discontent, because we cannot go on hoping that, by a dib here and a dab

there that satisfies governments or satisfies some industry or interest group; we somehow or other are going to have to appeal to the Canadian people to feel some sense of identification with the nation as a whole.

That is at the heart of everything I am trying to say. In the final analysis, Meech Lake's flaw is that it did not consult the interests of the citizens in national programs and in national institutions; and it does not address itself to the broader issues of the nation, including, obviously, the question of Quebec's identification with the Constitution, but including as well the other roots of discontent in the country.

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**Mr. Chairman:** Thank you very much. We have your full text as well to refer back to in a number of the areas you raised, and you have raised many questions that I think certainly we have been struggling with.

I will move right to questions with Mr. Breaugh.

**Mr. Breaugh:** I have a couple of areas I wanted to pursue with you, because I enjoyed this little session this morning. I think we are getting at some of the basics of it all.

The first area is that one of the things I see in this is a recognition that we are shifting the power balances in the country around a bit. I do not see it as being a lot or anything to get alarmed at, but there is a recognition here that some of our provinces now are big—population-wise, in terms of services, in terms of level of government—and they are not going to sit around and ask the federal government for permission to do anything any more. If Ontario, Quebec or many of our other provinces want to do something, they will proceed to do it.

The difficulty in this country is that we will continue for a long time to have provinces that do not have those kinds of resources, that have a population of less than an Ontario city. And all of this keeps changing: the demographics of the country change, the economics of the country change. I see in Meech Lake something of what you spoke to. There is a recognition that if the House of Commons is the sole source of power in the country, people in Saskatchewan are never going to be able to dominate that agenda. Meech Lake is an attempt to kind of shift that so that the provincial government has a little more power.

The American way is that everybody runs his own agency to do this, so there will be nine different agencies controlling drugs in the streets. In typical Canadian manner, there are only four publicly funded police forces that I am

aware of that are operating now in the city of Toronto. There are a few dozen private agency things. A couple of dozen other countries have their agents popping around the city. But we try to work out some negotiated arrangement about who does what. We share the costs and we share the responsibility, and we basically make the effort to try to plan that out.

I read most of what is in the shared-cost programs, the national objectives and all of that as an attempt to put in a more formal way what we have done in this country that we know works. We could lie to people and say, "If you live in Kapuskasing, you have the same right to hospital care as if you lived on Wellesley Street in Toronto." We could put that lie in the Canadian Constitution, but unless we intended to build six high-tech medical institutions in Kapuskasing, we could never produce that, so we have said we will not do it that way.

There is something typically Canadian about the Meech Lake accord in its attempt to grapple with that. I do not see that as being a bad thing. I appreciate that there are a lot of others who disagree with that immensely, but I really see that as being an attempt to grapple with the realities of this country, which is a very awkward piece of business to try to govern. I would be interested in your response to that.

**Mr. Johnson:** I have two comments. First of all, on the disparate size of the provinces, yes, I personally believe—if I understand you correctly, I am agreeing with you—that there must be flexibility in Senate representation in the future. I know what that means for the government and the people of Ontario. It would mean a smaller relative proportion of elected senators than from the smaller provinces, because the whole idea of Senate reform would be to give us a stake in the Parliament of Canada. That is why I am uncomfortable about Meech Lake, because it says that from here on in unanimity. It just makes me as a Saskatchewanian feel that we have no more flexibility left to look in that direction.

Your second point, again if I read you correctly, has to do with the relative power of governments to do things. Frankly, from my experience in the government of Saskatchewan—and we were a poor province when I was working there; we had a per capita personal income well below the national average—I believe that provincial governments can take initiatives under the present Constitution. There is no problem. We had all the constitutional powers we needed, and then some. And with an equalization formula now that virtually guarantees to every provincial



government an average per capita revenue from average levels of provincial taxation—that is what the equalization formula does—there is a fiscal capacity that, while not commonly spoken about by people like Mr. Peckford, is there. It is a very generous formula. One of the things I remarked on at the time of these very generous arrangements being made, may I say, is that there was never a whisper of dissent from the province of Ontario—never, no matter what Premier. So I come to the conclusion that the provincial governments have abundant powers. There is a fair equalization formula and, indeed, that has been guaranteed in the Constitution.

The sole remaining question is whether there is going to be a relative equality of rights of access of citizens. That is the issue of Meech Lake. I used to say to a Premier in Saskatchewan, who really believed in equality, “Look, we are never going to have an opera house in Biggar, I know that; but let us try to equalize the rights of the citizens somehow.”

Excuse me for being so long.

**Mr. Breagh:** I just wanted to pursue one other thing, because I note that if you conclude by attempting to assess some of the roots of the flaws in this accord, I really think what has happened here—and maybe it is a good thing—is that Meech Lake may be the kind of cornerstone whereby the Canadian people say: “The process that has been used to come to this agreement is intolerable. From this point on, we cannot proceed to change the Constitution of the nation by means of secret meetings, private negotiations between bureaucrats.” When you come right down to it, the critical decisions were made in private, and then there is an attempt to bully everybody else in the nation, to say, “You must all accept it.” I do not believe that is going to fly any longer, and my assessment is that part of all the suspicion and the aggravation about Meech Lake is very simply that if they had had the brains to open up the door and let people see what they were trying to do, there would not be as many angry citizens out there.

I would be interested in hearing you comment a little bit about how we move in a Canadian way to alter this process. I guess most of us would agree with the idea that if we had had this long series of public hearings in every Legislature across the country and we had all shipped our proposals off to Ottawa, and if the first ministers had sat down and said, “Here are the ones we can agree with,” we would all say we had had our input, the legislatures had had their say and they simply finalized the agreement. I do not think

very many of us would have an argument with that. We get a little upset when the shipment is sent the other way and you are not allowed even to question the process.

**Mr. Johnson:** I have two short reactions. I agree with you. I do not think the constitution-making of 1864, the Charlottetown conference, which set a precedent for our constitution-making up until now, is going to work any more; and to believe that it could is almost silly. The year 1864 is a long time ago.

Second, I think the way of doing it is precisely the way you mention. I wish the fathers of Meech Lake had said: “Here is our agenda and here is what we are trying to accomplish. We are going to send this to legislative committees across the country. They are going to have their hearings and they are going to arrive at certain conclusions.” That would not be a referendum. It would not absolve the Prime Minister and the 10 premiers from their responsibility to make a decision, but it would clearly illuminate their decisions and influence them.

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**Mr. Breagh:** Thank you.

**Mr. Cordiano:** Supplementary, Mr. Chairman, very briefly, and I will not ask a question afterwards.

**Mr. Breagh:** That is how he gets his questions in.

**Mr. Cordiano:** That is right. I might as well leave if I am not going to ask a question.

About this question on process, the whole fact is have we ever done it any differently?

**Mr. Johnson:** No.

**Mr. Cordiano:** Exactly. So we are talking about treading into a new area now, and probably a new—

**Mr. Johnson:** Slightly differently in 1981-82.

**Mr. Cordiano:** Well, variations; but essentially you had the leaders of each province, or the Premier of each province, and the Prime Minister or federal ministers—

**Mr. Johnson:** But you did have a joint committee in the Senate and the House of Commons.

**Mr. Cordiano:** In the House and the Senate, yes. But what I am saying is that, essentially, it was a small group of people without too much public participation determining the fate of the Constitution of this country, and I do not think it has ever been done that much differently.

What we are talking about is establishing new processes whereby we in this country perhaps

begin to become involved in an evolving Constitution—greater public awareness, greater public participation. It is something new. I think we are on the cutting edge here. If we can come up with a process whereby it enhances the average citizen's awareness and allows for the opportunity to participate in constitution-making, that is something new.

**Mr. Johnson:** Yes, I agree with you. I do not know how practical this is. One of the wonderful things about being retired from the public service as a practitioner is that you do not have to be as responsible in your advice as you had to be before.

Interjections.

**Mr. Johnson:** I think it is a very nice question and I would be raising this if I were advising a minister. It is a very nice question whether even now it would not be possible to suggest that, before the final ratification by the legislatures, the premiers and the Prime Minister meet to consider in some digest form the questions that had been raised by the several hearings across the country: no commitments, but to consider them, maybe to answer some of the key questions, maybe just a little short agenda of key questions and just tell us, just tell me as a citizen.

Second, I would be saying—and this I think they ought seriously to consider—that they have their constitutional discussions about the Senate before Meech Lake is settled.

**Mr. Chairman:** I have Miss Roberts, Mr. Allen and Mr. Offer.

**Miss Roberts:** Miss Roberts is always very brief. I enjoyed your presentation, sir. It was very helpful.

There are couple of things I would like to indicate. If we are going to change the process, most likely it will be helpful if Quebec is in on the change in the process—

**Mr. Johnson:** Yes.

**Miss Roberts:** —and Meech Lake, of course, would appear to bring Quebec in. That is one comment. I enjoy what you have just said about their getting back together and discussing things. That will be very helpful.

The other comment I would like to make is historical. If I remember correctly, in the 1920s and 1930s and up in the 1940s—I do not remember all the 1920s—

**Mr. Johnson:** I come a lot closer than you do.

**Miss Roberts:** In that era, the federal government took away some of the powers that might have been exclusively provincial, and we saw in the 1940s, the 1950s and the 1960s that the

federal government became more and more interested in areas that were exclusively provincial.

I say to you that now that is changing. The provinces now are wanting back some of their own, and I am talking about on a very political basis. In the 1940s, 1950s and 1960s we changed our country, very much so, made it much more nationalistic than we had ever done before. Now perhaps this generation, the people who were meeting there at Meech Lake, have a different view of Canada and a different way of moving. I suggest that view may be the view of the future. Whether it is right or wrong, I agree with Mr. Breaugh that I do not think Meech Lake changes it as much as a lot of people have led us to believe.

But I think we should put into perspective the fact that the national government took over so much in the 1940s, the 1950s and the 1960s with respect to spending. It is not that those programs were not necessary, but what they have done at Meech Lake is try to constitutionalize what has gone on and maybe force everyone back to the table to rethink the spending powers.

**Mr. Johnson:** Without being argumentative, I would put it to you that the redress has already taken place. What you say is quite true. Aside from the amendments to the Constitution—which I have spoken to and I will not repeat myself—there is no question about it, that in the late 1940s, the 1950s and the 1960s the government of Canada increased its cultivation of the tax fields. This meant that the federal proportion of tax revenues increased very markedly, relative to the provincial-municipal proportion.

That has been more than completely redressed. That is to say—I wish I had my numbers with me—the federal government revenues, as a proportion of total revenues now has gone back to what it was before. In other words, the provincial-municipal proportion has increased enormously. So it seems to me that if you look therefore at the Constitution as it exists, the endowment of powers is sufficient. I do not think any province has ever argued, “We don’t have enough power,” except Quebec in the “opting out” line.

Second, the balance of actual expenditures, and therefore the real balance of power if you want to put it that way, has been redressed very substantially in historical terms.

I am really agreeing, though, with your basic proposition. There is no point in going back to the 1960s and saying that is the ideal time. Can I bootleg this into the sermon, since I am not



getting paid any royalties? I did a little history of social policy in Canada from 1945 to the present, all in 50 economical pages. It has been published by the Institute for Research on Public Policy. It is just kind of a useful guide; I was going to say catalogue, but I hope it is more than that. You might find it interesting in connection with the question you raised.

**Miss Roberts:** I appreciate that. Thank you, sir.

**Mr. Chairman:** Is that a copy you can leave with us?

**Mr. Johnson:** I can leave it with you.

**Mr. Chairman:** Fine, thank you very much. That would be helpful. Mr. Allen and then Mr. Offer; and I am mindful of the hour.

**Mr. Allen:** Thank you very much, Mr. Chairman. It is a great privilege to have Mr. Johnson with us this morning, both to present his own comments and to subject himself to our questions on this subject in which he has been immersed for so long.

**Mr. Johnson:** Thank you.

**Mr. Allen:** Could I ask you first of all, just quickly, vis-à-vis the last question, some people involved at the federal level of Canadian politics through the periods of the late 1940s, the 1950s and the 1960s have said that notwithstanding the impression that a lot of centralization and national stuff was going on, in reality what was happening was immense growth in provincial responsibilities, powers and needs, which launched them into a much more powerful position, in effect, in Confederation. Is that also your perception alongside of what was happening nationally?

**Mr. Johnson:** Yes, in a certain sense. The way I would put it is this. The small-g government was increasing very substantially in the 1960s and 1970s, and particularly, of course, in the social policy area. That increase of small-g government involved both the federal and the provincial governments. When one was talking, for example, about shared-cost programs, there was no shift in constitutional powers to the federal government.

On medicare, to take the obvious illustration, the provincial governments remain in control of their medical care programs. The federal intervention, which increased federal expenditures alongside the increase in provincial expenditures, manifestly said just what I have mentioned. If the provincial programs conform with the four principles, now five, under the Canada Health Act, then the people of Canada, through

the government of Canada, will support those programs.

So there was a parallel growth. What was happening in the 1950s and the 1960s, however, in terms of this relative balance of power, was that the increases in federal tax that had taken place earlier rendered extremely difficult politically the increases in provincial taxes that had to go alongside of this concurrent growth in the exercise of power.

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**Mr. Allen:** OK. Second, I am not sure just how far you are pushing us this morning. Are you suggesting that we, for example, report that we see problems in the accord at a number of levels and that we, as a committee, recommend that the Legislature pay attention to those and make some requests in that respect, but that none the less, the Legislature ought to endorse the accord, in the hopes that the premiers would return to the table, as you suggested, and at least look at them?

Or are you suggesting that we should take what, from some perspectives, is the more dangerous course with regard to the incorporation of Quebec, and reject the accord as it stands? Should we recommend that to the Legislature and let the Legislature reject, and in that respect, try to force the first ministers back to the table to do the reconsidering? What is your sense on that?

**Mr. Johnson:** Number one: reject, no; that is not my view.

**Mr. Allen:** No.

**Mr. Johnson:** To create another occasion for the review of some of the central issues that are raised; yes, that is my view. How practical it would be in the current context is for the elected politicians to judge. I am not averse to saying what I think, but I have done that.

Number three, the bottom line in my view—and I am not saying this would make some of the participants in Meech Lake happy—I would say two things: I really do think seriously that, along with number two, or without it if you reject it, you ought to look seriously at the amending power, that is to say the amending process for future amendments. Why not at least consider the inclusion in the Meech Lake amendments of a process under which you would not alter, if they are unwilling to alter the formula for amendment, but change the process so that legislative committees, etc. would have the hearings and so on? That is the (a) of my point three. The (b) I stick to; which is to say since you promised to review the Senate anyhow, review it before you finalize Meech Lake.

**Mr. Allen:** So you do take very seriously the consequences of a rejection?

**Mr. Johnson:** Yes, I do.

**Mr. Allen:** In terms of what might follow.

**Mr. Johnson:** A flat rejection is just not in the cards. It should not be in the cards.

**Mr. Allen:** Yes, I see. Thank you very much.

**Mr. Chairman:** Mr. Offer.

**Mr. Offer:** I would like to carry on with that point, and it deals again with the process. You are saying "no" to rejection, yet I am wondering if you could expand a little bit from your vast experiences, and direct our minds to how this whole process with respect to some of the concerns which we have heard ought to be dealt with.

What type of process ought to be considered by this committee? Because you know that while we are talking on one hand, of course, about constitutional reform and the particulars of what is in Meech Lake, we are also talking, on the other hand, as to how those particulars came into being and what might happen in the future. You certainly have a vast amount of knowledge with respect to the whole question of dealing with this particular reform.

You have indicated previously that what happened at Meech Lake is not very much different from what happened in years gone by with respect to process, but my feeling is we now have a Charter of Rights and Freedoms and people are much more concerned, they are much more aware. It is a growing concern and a growing awareness as to this type of Constitution and how it will impact upon their day-to-day living.

I think, from my perspective, it is becoming very clear that people are demanding that there ought to be some sort of process in place for future discussions revolving around the Constitution.

**Mr. Johnson:** Yes, and I will try to address myself to both of those. The first is the process as I would like to see it unfold before Meech Lake. I have mentioned that I think it would be a good thing for the premiers and the Prime Minister to say, "Yes, before ratification we will do X, Y, and Z." I will not repeat myself. Quite clearly, what would be involved if the Prime Minister and the premiers, particularly the premiers of the three provinces where legislative ratification or confirmation has already taken place, were to say, "No, we will not do that"? That lies within their power.

All I am saying, in another way around, is: "Is it really wrong for us to ask you to be a little bit more flexible? Before you make up your minds, just listen. You still have the same powers of confirmation or ratification or otherwise and it may very well be that the answer to you and the answer to me as a citizen is, 'No, we have made up our minds and there is just no way we are going to do that.'"

Then my fallback position would be just the same as yours: "All right, if you will not listen to us now, will you at least, by yourselves, have another secret meeting at Meech Lake and in that secret meeting come out with a reformed Senate and come out with a new process for the future?" If they say no to that, so be it; they have said no to it.

**Mr. Offer:** About this whole question of the secret or closed meetings and things like that, I really do not know if I am that uncomfortable. I think in your first couple of pages you have also alluded to the fact that you are dealing with areas that are very sensitive and there is room and there is need in many ways for secrecy. In our lives there are many examples where we do deal with areas of great sensitivity. With respect to the whole format in this area, it could be argued that there was ongoing discussion. I think this whole Quebec round spoke to that.

**Mr. Johnson:** The previous round did, yes.

**Mr. Offer:** There was the Meech Lake accord and there was a second meeting that came out with the Langevin agreement. The first ministers have signed that. Are you suggesting that the process could be improved, that even if we kept all of those stages in place, these hearings would commence across the country; of course, at the discretion of the Premier? I imagine they always have that discretion and how they use that discretion is certainly for them alone. And then a report back to the Premier for final ratification.

**Mr. Johnson:** Yes.

**Mr. Offer:** Is there something terribly wrong with any Premier or first minister, first—and I am asking from your experience—having these meetings of a sensitive nature in private; and second, saying: "Yes, I agree and I believe in this agreement. I have signed my name to it and we are now going to have public meetings on this, but I want the people" of the particular province or country, "to know where I stand on it"?

What is so wrong with someone saying, "This is what I happen to believe in"?



**Mr. Johnson:** Secret meetings are absolutely essential on most things in government. Goodness gracious, most of the things that went on in federal-provincial relations over the years, the decisions really were taken in secret. There is no point in pretending about that. For example, if you will forgive one personal illustration, when we arrived at the notion of principles for the medicare act, we did not have a great big public consultation about it. It was Claude Morin and I sitting in a hotel room talking about what would work and I had put to him this possibility of principles.

When the governments of the provinces made their decisions concerning medicare, they did not not have public meetings. No, no; I agree with the secrecy of government in the difficult decision-making that is going on. I clearly did not make myself clear about this, but what I am arguing for is a kind of prepolicy stage, if you could put it that way. I think society has changed so much that what I knew as a public servant for 30-odd years is just a little bit out of date and that what we need is this prepolicy stage where the citizens at least feel that they have had a chance to have their say, and then the secret meetings start.

You can use exactly the same process if you want. I do not want to leave the impression that I think you are going to make policy in a town meeting, as the Americans used to have and I guess still do have in New England. You are not going to do that. So I am agreeing substantially with the principles or the direction of your thinking, I believe.

**Mr. Offer:** I would like to carry on with that. I very much appreciate your thoughts and your positions on these matters. You have come with a great deal of experience and it is certainly going to be very useful in our deliberations.

**Mr. Johnson:** I got a lot of bruises anyway.

**Mr. Offer:** You guys know what you are talking about.

**Mr. Chairman:** Despite the bruises, we want to thank you very much for having come, not only for your presentation, the paper, but also the document which you indicated you could leave with us. I also think, in the answers to a number of the questions, you have set out some interesting ideas with respect to procedures, process and how to look at the accord in the predicament in which I suppose, as a committee, we are in trying to come forward with a report that will be helpful. We very much appreciate the time you have taken to be with us this morning.

**Mr. Johnson:** Thank you very much. The privilege was mine.

**Mr. Chairman:** If I might then call upon our next witness, Gordon Crann. Would he come forward? As you are undoubtedly aware, Mr. Crann, we are running behind, but that is not to say we are going to take less time in listening to you or asking questions. We want to welcome you this morning. We have received a copy of your submission, so if you would like to make your presentation, we will follow up with questions. Please, go ahead.

#### GORDON CRANN ASSOCIATES

**Mr. Crann:** To introduce myself, I am probably best known to you as a former political columnist at the Toronto Star. I used to write a column in the Sunday Star. In that role, I wrote a number of columns on Meech Lake so I would like to share with you some of my thoughts on Meech Lake today, although I am not going to try to compete with the academics who preceded me this morning and discuss Meech Lake in detail and discuss Canadian constitutional history.

I am going to take a little different approach by bringing some of the American experience to you and ask you not just to go back 120 years to Confederation, but to actually look at the similarities between the debate that is going on with Meech Lake here in Canada today and similar debates that went on in America 200 years ago when it was drafting up its Constitution in 1787 and ratifying it in 1788.

As I point out in the brief, although there is certain common ground, in that everyone agrees that Quebec should be reconciled with the Canadian constitutional family, the way the debate has progressed there has been a certain polarization, so that you have two camps. One camp is saying: "You can't touch it. You have to ratify the agreement as is, or else the whole pact will unravel before us and we won't be able to bring Quebec into the accord." The other side is saying that there are fundamental flaws in the agreement and that it is a real threat to national unity here in Canada. In fact, even if it means keeping Quebec out of the constitutional family at this time, some of those people maintain it might be even better to try to reopen it and change the accord now.

What I want to point out is that there is a middle position here. This is actually the position that was developed in the United States 200 years ago. There are a number of similarities, when you look at the constitutional convention that took place in Philadelphia from May to September of 1787, even though this was a convention where not only the heads of government got

together and decided what was going to be in the Constitution, but also there were representatives from each of the states involved who were sent there.

Even though it went on for four months, and was not just the bargaining session that we hear a lot about with Meech Lake and a lot of criticism about, it still was criticized as being too secretive. The simple fact that the delegates to this convention were sworn to secrecy and word did not get out as to what they were proposing in the Constitution until after they had signed the document and transmitted it to Congress, that in itself raised certain criticisms 200 years ago.

Because of the compromises that they had to reach—just like at Meech Lake, even though there was a lot of discussion beforehand—what came out was not what people expected. This is something that seems to be endemic to the process of negotiation between various political actors. The document that you come up with is not the same as what you thought you were going to get when you went in to the negotiations.

Continuing on with another similarity, Congress quickly voted to transmit the draft Constitution to the states for ratification, and five states very quickly ratified the Constitution within a few months. It was not until the Massachusetts debate in January 1788 that we really saw that there was a fair amount of opposition.

There were two strong camps, one called the Federalists, who were in favour of the Constitution and were urging it to be ratified without any changes, and the other called the Anti-Federalists, who raised a number of concerns of which probably the primary one was that the Constitution as drafted did not protect American civil liberties. They raised the fact that the American Revolution had been fought over the protection of the civil liberties of the citizens and that the Constitution was a threat to that. Again you can see certain similarities between the debate that is going on today and the debate that took place in America 200 years ago.

At the Massachusetts convention, the first look showed that the Federalists were in the minority, and it looked like the Constitution was going to be rejected by that state convention. But in a dramatic move, the governor of the state came in with a compromise. That compromise was to ratify the Constitution, but also to propose amendments that would not be conditions on ratification but would be suggestions for future constitutional action.

After Massachusetts took this step, it is interesting that three other states, New Hamp-

shire, Virginia and New York, also used what was becoming known as the "Massachusetts formula" to ratify the Constitution. All of them included recommendations that a bill of rights be constitutionally entrenched to protect Americans' civil liberties.

## 1150

Actually, the first 10 amendments to the American Constitution are the American Bill of Rights. So this demonstrates to you that it is possible sometimes, if certain conditions are met, that you do not have to reopen an accord that has been made on a Constitution, that there is the opportunity to recommend certain amendments and that through a future process of constitutional reform and renewal, those may be adopted at a later date. In the American situation, by 1791, only three years after the ratification of the Constitution itself, the first 10 amendments were in effect. So it was a very short period before those concerns that had been raised through the process actually came into fruition and became effective.

As I go on in my brief, I note that there are probably four lessons that you might learn from the US experience. The first one is that this compromise procedure is possible and it is possible for it to work, although there is no guarantee that amendments that are proposed in this way will eventually be adopted. I do not think any politician can guarantee that all the other constitutional actors are going to go along with whatever Ontario or any other province recommends.

If you meet some of the conditions—and I point them out here—my second point is that the amendments should have a couple of attributes. There must be a certain general popular support for an amendment, so that political pressure is maintained after the ratification. In the American situation, this was the case, because obviously Americans believe very strongly in a need to protect civil liberties and that kept the pressure on so that the Bill of Rights actually took place just a few years later.

The other thing that you should note is that probably an amendment should not try to directly curtail provincial powers. The original American Bill of Rights only applied to the federal government. It was not until after the 14th amendment in 1968 that civil liberties protection was extended to state and local government action in the United States. So when the states voted in favour of an American Bill of Rights, they did not really perceive it as a threat to their own powers.



Obviously, certain of the amendments that are proposed—and I direct this to people who are concerned about the spending power restrictions and would like to see the federal government back to a pre-Meech Lake period in the freedom that they had to use federal spending power, and people concerned about the appointment process to the Senate and to the Supreme Court of Canada—I am suggesting that those sort of amendments just will not fly. The provinces will be opposed, and it really does not make too much sense to make those sorts of recommendations.

My third point is that for an amendment to be successful afterwards, there has to be active support in more than one province. The fact that four out of 13 states supported the recommendations that there be certain amendments to draft up a bill of rights I think is key. In the Canadian context, you are probably looking at at least three or four provinces being required to actually put a serious amendment on the constitutional agenda in the near future.

That raises certain concerns that perhaps a province like Ontario, if you want to go this route, should consult with some of the other provinces that may have similar concerns. If there can be some sort of concerted action, then that raises the chances of a future amendment being adopted, that it be given the serious consideration it deserves.

The final point I make is that the compromise procedure itself can avoid certain long-term antagonisms that a simple, straightforward ratification without any recommended amendments sometimes produces. I point out that in Pennsylvania where the strict ratification was pushed through in a hurry—in fact, just to show you how far the heated debate went on both sides, at one point in the Pennsylvania convention, the Federalists lacked a quorum and a mob actually went out and grabbed two Anti-Federalists who were in a hotel and dragged them to the location where the meeting was taking place and locked the doors after they were there so that the quorum was achieved. Now, I am not saying that sort of action is going to happen here, but that illustration will tell you that the Anti-Federalists did not take their defeat very lightly when such tactics were being used against them.

It is interesting in both Virginia and Massachusetts, where there were very close votes—the Anti-Federalists lost in trying to defeat the Constitution in those two states very narrowly—they took their loss very well. I am suggesting part of the reason for that may be the fact that they knew at least their concerns were being ad-

ressed perhaps in the future in the fact that certain amendments were being recommended for future consideration.

I think in Ontario's case that procedure may be one way you could help to soften the blow to those who have concerns about Meech Lake. Instead of just ramming through ratification in this province without addressing some of the concerns and trying to suggest that the first ministers consider these in the future, it may be wise to try to address them in your recommendations. Also, it may be another way of addressing some of the concerns New Brunswick has raised. It seems to be the province most adamantly opposed to the Meech Lake agreement at this point.

With those comments, I would be pleased to answer any questions.

**Mr. Chairman:** Thank you very much. That is a very thought-provoking paper. I do not think we have thought of the American experience and linking it to what we are about at this point in time.

We did have yesterday, with the Metis presentation, a somewhat similar approach in terms of using—I forget the term they used—but an amendment that would go forward independently. I think that is an interesting proposition.

We will begin the questioning with Mr. Eves.

**Mr. Eves:** Mr. Crann, you have stated in your last paragraph that you hoped your presentation would be both informative and thought-provoking. I can assure you that it is both. You have certainly achieved that objective, as I am sure many members of the committee would agree.

I want to pursue a couple of points. Although I appreciate the point you make about recommending changes—for example, the chairman just alluded to Mr. Recollet, the president of the Ontario Metis and Aboriginal Association who was here yesterday. He came at this from a somewhat different perspective. In his opinion, aboriginal rights will be put on the back burner by the federal government and provinces for ever if the Meech Lake Accord is passed before their concerns are addressed. This is why his group has come up with an idea of a companion amendment, which I must say is a very novel approach and one this committee has not heard of prior to yesterday.

My question is what response does this committee have to people like the aboriginal peoples who are not even included as one of the two agenda items on the next round of constitutional talks? The 11 first ministers obviously did

not think enough of their plight as Canadians to put them ahead of Senate reform and fisheries in the next round of talks. What solace are they going to get from a supposed recommended change if the same 11 people did not even have enough concern to include them on the agenda for the next round? Likewise, we have heard from Canadians from all three political parties in the Yukon, and similar concerns are expressed by Canadians from the Northwest Territories.

**1200**

They are concerned basically that they will have a somewhat lesser status as Canadians with respect to their right to become provinces, that they will not have the same right other provinces have had, for example, the western provinces in 1905 which did not require unanimous consent of all other existing provinces. They do not have the right of nomination to the Supreme Court of Canada or to the Senate of Canada. I think what they are telling us in very blunt terms is that they somehow feel they are being treated as second-class Canadian citizens. What hope would a recommendation approach hold out for those people?

**Mr. Crann:** Just to address that point: as far as the independent amendment proposed is concerned, I certainly would not be opposed to that, although I do not think it should be a condition of ratification here in Ontario. I do not think Ontario should say, "Either you meet this condition or else we reject the accord." I think that would probably unravel the consensus that was reached at Meech Lake and the Langevin Block.

As far as what hope we can give to these various groups is concerned, as I said I do not think one province just on its own, no matter what it does at this point, whether it is an independent amendment or recommendation for future amendment, can guarantee that those groups' concerns are going to be put on the constitutional agenda and considered by the first ministers in the immediate future.

Certainly, I am sympathetic to those concerns, but I think that if there were a concerted action by three or four provinces—when you look at the amending formula, it takes seven provinces representing 50 per cent of the population to pass any amendment, even those that do not require unanimity in the Constitution—that would make the other first ministers take notice of their concerns. They would have certain bargaining power and a certain way of ensuring that those groups' concerns were put on the constitutional agenda in the near future.

**Mr. Eves:** My last point is that I think those concerns that have been expressed by those groups can only be addressed by specific amendments to the accord and it is probably not very realistic that this is going to happen.

There is, however, one concern that many groups have expressed before the committee, and that is the question of equality rights and section 16 of the accord; and for that matter the question of any other rights under the Charter of Rights and Freedoms. We have had constitutional experts and lawyers on both sides of this issue, so I think it is safe to say that it is at least ambiguous or uncertain, if you will, what effect, if any, section 16 has on those rights. We have heard enunciated by just about all, if not every one of the 11 first ministers, that it was certainly never their intention, by the language of section 16, to in any way derogate from or subject those rights to the accord or to have the accord or Constitution supersede those rights.

If that is what everybody means, and if it can be clarified by a very simple amendment—or to take my friend's suggestion, and one that was made by Professor Baines to this committee, by a Supreme Court reference on that one item, on which they are all saying they mean the same thing, but there is some ambiguity, some uncertainty of language. The witnesses who have appeared before us with that point of view have said it makes sense to clarify this before it is ratified, not have some Supreme Court decision five, six or 10 years down the road tell us that it is not of the opinion that it means what the 11 first ministers thought it meant after all.

**Mr. Crann:** Just to reply to that point, I have two replies. One is that if you are talking about trying to reopen the Meech Lake accord for this one single amendment, I am pessimistic; that once you reopen it other items will be put on the agenda and that will reopen the whole thing. Once you reopen something like this, I think there is going to be great pressure to have all sorts of amendments. I do not think you can narrow it and isolate it down to just this one amendment. As far as it being a condition of ratification is concerned, I do not think that would work.

As far as the reference to the Supreme Court or to the Ontario Court of Appeal is concerned, there are two concerns I have with that. First, my understanding is that any reference would just be an advisory opinion of the court and would not be actually a binding decision of the court. That is my understanding of the reference procedure.

The second is that such reference procedures are difficult in that there usually is not a fact



situation before the court. It is almost as though a hypothetical question of law is being put to the court for its clarification. I do not think that those reservations preclude the use of that sort of procedure, but I think it cautions against using it in situations where perhaps you are looking for more than the court can give you in its advisory capacity. I do not know if I am clear on that. I want you to realize that I am not ruling out that procedure, but there are certain qualifications you have to realize are there in anything like that.

**Mr. Eves:** I agree. I think every witness who has suggested that has said there is no doubt that you could not pose all kinds of situations to the court, but I think you could be quite concise and narrow and ask the court a very simple question: does section 16 of the accord override the rights in the Charter of Rights and Freedoms, yes or no? I am sure the court's decision is not going to be yes or no, but I think the question could be put that succinctly, if you will. I can tell you that some of the women's groups that have appeared before the committee are most adamant about this, that the matter should be clarified before it is ratified by all the legislatures.

**Mr. Elliot:** I would like to thank you very much for coming and making an excellent presentation, particularly because we are in a real crunch in constitution-building in Canada. You are one of the few people who have come with a very definitive approach to a solution based on historical facts. This is very appealing. My question has to do with perhaps extending your ideas a little bit in a certain way with respect to your proposal. Because of your background, you are obviously are on top of the situation and probably have certain impressions about whether your proposal would be successful. My question is, do you think that with the way everything has evolved to this point with respect to the accord, that the climate is right for a proposal like your own to be successful in Canada at this time?

The reason I say that is that I think the decision-making process was, in law, quite correct, the process that gave us the present accord we are pursuing. But because of the fact that there was a lot of citizen involvement and group involvement in the charter prior to its being carved in stone, I think that has whetted the appetite of the Canadian people. They are demanding, if I am hearing the groups correctly, that kind of involvement on a continuous basis. My concern is, in your opinion has the leadership heard that demand?

**Mr. Crann:** I think the leadership has heard the demand from the organized groups that have

been making presentations. I also think the fact that at this point New Brunswick is a real question mark as to whether it will come along and ratify the accord will just increase that pressure as the process goes on. Something like what I am proposing may be, down the road, the solution everyone is looking for to bring the consensus together and to finally approve and adopt the Meech Lake accord.

**Mr. Allen:** I appreciate the fact that Mr. Crann has come before us this morning. While he noted his credentials as a representative of a consulting firm on the one hand and as a former journalist on the other, he did not tell us that he also had been rather heavily immersed in politics in the city of Toronto for a few years and ran provincially in a very impressive campaign in York East. Some of us were unhappy that he did not come to the Legislature at that time and we now see what we missed. We would have this kind of this input in the Legislature had he been successful.

I think there are many tangents one could follow up, Mr. Crann, with respect to your presentation. I just want to note in passing, as a conclusion to our discussion, that you did not mention that the Federalists were led by somebody by the name of Hamilton. I am glad to see you have injected the Hamiltonian side of the whole debate into this consideration of Meech Lake.

**Mr. Chairman:** That is one Hamiltonian you would not necessarily have felt at home with.

**Mr. Allen:** That I would not necessarily have felt at home with; that is quite true. Mr. Hamilton did not entirely agree with Mr. Jefferson, with whom I have normally sided in most of these matters. That is the end of my comment.

Interjections.

**Mr. Chairman:** We have been able to work in many American references in this last presentation and we may have to make comments about—I think there was one other witness, I think it was Professor Stefan Dupré, who talked about the Jeffersonian approach, so it is only appropriate that today the counterweight comes into being.

I know I speak on behalf of all members of the committee. Thank you very much for taking a very unique perspective on the accord and for using another country's approach to a somewhat similar kind of problem. I think that has raised a number of questions in our minds. We are very grateful to you for coming and putting those thoughts before us.

**Mr. Crann:** Thank you. I appreciate the opportunity to be here.

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**Mr. Chairman:** That concludes our morning session. We will begin again at two o'clock.

The committee recessed at 12:12 p.m.



## AFTERNOON SITTING

The committee resumed at 2:04 p.m. in room 151.

**Mr. Chairman:** We can begin the afternoon session. I will invite Professor Ian Greene of York University, department of political science, to come forward and take a chair.

Professor Greene, in addition to the paper he will be presenting, of which we all have copies, has provided us with a copy of the Canadian Bar Association committee report on the appointment of judges in Canada. He had four copies which worked out perfectly. I have given a copy to each caucus and we will have one for the legislative researcher as well. We thank you very much for those and we thank you for coming this afternoon. If you would like to begin your presentation, following that we will get into a period of questions.

DR. IAN GREENE

**Dr. Greene:** To begin with, I would like to tell you why I was interested in making a presentation to your committee. I have only lived in Ontario for three years, although I spent several more years here doing graduate school in the 1970s. I am a native Albertan and I am one of the many Albertans who has come to Ontario in part because of the economic crisis in the west. As Mr. Beer said, I teach political science at York University and I specialize in constitutional law and public administration.

I am a strong believer in the democratic process and citizen participation. When important constitutional decisions like the Meech Lake accord occur, I think I have a responsibility to think about these issues and to try to contribute to the process. So I am delighted that you are holding public hearings and that you have taken the time to hear the views of so many people.

I essentially agree with the analysis presented at these hearings by Professors Russell, Hogg and Smiley. In fact, I owe much of my thinking about the Constitution to these three great Canadians and I will try not to deal with the issues they have already dealt with.

What I will be arguing is that although the Meech Lake accord makes an important contribution to the creation of conditions for greater harmony among political élites in Canada, it does little to address some underlying problems of democracy. However, the results of the Meech Lake accord present opportunities to address

some of these problems. My three recommendations are:

1. That a Senate nominating committee be established in Ontario to draw up a list of names of possible Senate appointments for consideration by the Premier.

2. That an advisory committee be established in Ontario to propose candidates from Ontario for the Supreme Court of Canada.

3. That a standing committee on the Constitution be established in the Ontario Legislature to consider important constitutional issues, to review significant judicial decisions on the Constitution, hold public hearings where appropriate and make recommendations with regard to constitutional reform.

In spite of the positive aspects of the Meech Lake accord, it should not be overlooked that the process which led to the accord was a setback for the promotion of democratic participation in the constitutional process. Thus, it would be better for the health of the Canadian political system to regard the accord not as a completion of the constitutional process, but as an event which could trigger the beginning of a constitutional revitalization.

I would like to begin by sketching what I take to be the ideals of a democratic country and will compare them to the reality in Canada today.

We political scientists describe Canada as a liberal democracy. I think it is worth while considering the thoughts of some of the leading philosophers of liberal democracy. Both John Stuart Mill and Rousseau were of the opinion that democracy could not survive without a high degree of participation by the people. For both these philosophers, participation meant something far deeper than voting at election time.

According to Mill, political discussion has an educative function. Through political discussion, a person "becomes consciously a member of a great community" and learns the skill of finding solutions to general social problems, in contrast to purely personal problems. Rousseau stressed the educative value of citizen participation in decision-making. He felt that unless people had some experience in the making of general policy decisions, they would fail to realize the importance of the principle of the rule of law and therefore might lose respect for the legislative process.

Both Mill and Rousseau emphasized the importance of citizen participation in decision-

making not just at election time, but between elections through informed discussion, in local political institutions and in the workplace. For both Mill and Rousseau, when basic changes to the constitution are contemplated, citizen participation is especially important.

It saddened me when I heard the Premier of Alberta announce that there would be no public hearings in that province on the Meech Lake accord. He said that in our system of government we elect our legislators to make these kinds of constitutional decisions for us. Premier Getty's theory of democracy is dangerous. The election of legislators is just one aspect of political participation. I agree with Rousseau and Mill that unless a broad degree of political participation occurs in a democracy, especially when constitutional changes are taking place, democratic institutions will have shallow roots prone to being swept away during serious crises.

**1410**

In Canada, we are far from living up to the ideals of democracy painted by such philosophers as Mill and Rousseau. We are fortunate to have fairly high turnouts at election time for federal and provincial elections. We do better when there is some doubt as to the outcome and we certainly do far better than the Americans. They will be lucky to get 50 per cent of their voters out at the next presidential election.

On the other hand, we do not do well at getting voters out at municipal and local elections and, even at the federal and provincial levels, only about 10 per cent of Canadians seem to be informed about and interested in what the parties consider to be the main issues of an election. Election outcomes are often decided by the least informed 30 per cent of the voters, those who are easily swayed by slick advertising campaigns. Probably only about a third of Canadians have participated at any time in their lives in decision-making in organizations designed to solve community problems. Moreover, not many public or private organizations encourage meaningful participation in management decisions in the workplace, although this participatory management approach is becoming more popular.

There is obviously a gulf between the ideals of democracy and reality. The essential reason for this gulf is that democracy is a relatively new concept. Our ancestors lived for centuries under authoritarian regimes, except, it should be noted, for our native Canadian ancestors, many of whom lived in participatory democratic societies. There is a hangover from previous ages which has a tenacious staying power. Given that

we think that the goals of democracy are valid, that it is important for individuals to participate in making decisions which affect how they conduct their lives, where should we be headed with respect to future constitutional reform?

I am assuming that the Meech Lake accord is a fait accompli, so I will be concentrating on the agenda which the Meech Lake accord has set for future constitutional change.

First, Senate reform: it is important to keep in mind how Senate reform became an issue. During most of the years of the Trudeau government, there were very few Liberal MPs elected from the four western provinces, so the western provinces had little representation in the federal cabinet. This greatly annoyed westerners, but not enough to elect more Liberals.

In 1981, the Canada West Foundation, a western Canadian policy research organization, produced a report on western representation which recommended an elected Senate with equal representation from all provinces and with effective legislative power to address regional issues. The Senate would be elected through a system of proportional representation so that all parties with a significant following would likely end up with some degree of representation in the Senate. The Senate therefore could provide some cabinet ministers, no matter what party was in power.

This idea of the so-called triple-E senate caught on and some western premiers became committed to it. The concept, as you know, became a bargaining tool during the Meech Lake accord negotiations. Senate reform was agreed to in return for the western premiers' acceptance of the "distinct society" clause. Because no agreement could be reached on the exact form that Senate reform would take, an interim agreement was reached, which you all know about.

The idea of an elected Senate of the sort proposed by the western premiers has some merit. When I lived in the west, I supported the concept; now that I have moved to Ontario, I have changed my mind.

**Mr. Chairman:** We all can grow and develop.

**Dr. Greene:** The reason I have changed my mind is that I think that the hopes which some westerners place on an elected Senate may be too optimistic. I think what may happen with an elected Senate is that power groups would form. Western senators would be one group and Ontario and Quebec may be another. The maritime senators would be the power brokers, and things may not turn out as westerners would



hope. I think this will cause increasing disillusionment with the political system rather than more acceptance of it.

Another problem with an elected Senate is that it tends to stress the idea that voting is the only legitimate form of participation in a democracy. I think the solution to this problem lies in electoral reform in the House of Commons rather than in the Senate. I do not have time to go into that here because of time constraints, but I have some ideas in my presentation notes.

I have been impressed by the way in which the current Senate has proposed sensible changes to the drug patent bill and to the two refugee bills. I think we would be better off in Canada with an upper House for sober second thoughts than without it altogether, but the old method of selecting senators is clearly inadequate. The interim method, I think, is almost as unacceptable. It allows for provincial input into the selection of senators but it does little to guarantee the highest quality of appointments.

One possible solution to this problem would be to establish a Senate nominating panel in each province. Such nominating panels could be composed of representatives of some of the major interest groups in the province, including labour, business, the professions and so on. It would be important to include a representative of disadvantaged groups on such a panel, such as the poor, the unemployed and the handicapped.

It would be the responsibility of the nominating panel to create a list of the best-qualified candidates for the Senate. The list would then be presented to the provincial Premier, who would be required to choose from a name on that list and submit that name to the Prime Minister. Such a system, I think, would result in a Senate which would function much more effectively both as a House of sober second thought and as a House which would represent the diversity of the provinces in Canada. It would represent truly regional interests, not simply the interests of the provincial premiers. Because such a Senate would not be elected, it would not have the same political clout as the House of Commons and, therefore, it would not be prone to creating standoffs between the two Houses. At the same time, it could have a very positive influence on the legislative process.

Perhaps your committee could consider recommending an experiment with this approach. An experimental Senate nominating committee could be established in Ontario. If the idea works, it might be picked up by the other provinces.

Second, the Meech Lake accord and the Supreme Court: it is fitting that an institution with the importance of the Supreme Court should be granted constitutional status. Moreover, it is essential that both the federal and provincial authorities should play a role in selecting the judges to the court because, after all, the court is the arbiter between these two orders of government. I have two concerns about the new process, however.

First, the process established by Meech Lake for the selection of Supreme Court justices is inadequate. I think it could easily result in low-quality patronage appointments, especially if the provincial Premier and the federal Prime Minister are from the same party. All I want to say here is that I completely agree with the remarks that Professors Hogg and Russell made to you in recommending the suggestions of the Canadian Bar Association committee recommendations. Now you have copies of these.

I sincerely hope that your committee will recommend the establishment of such an advisory committee in Ontario. One positive aspect of this proposal is that it can be undertaken without a formal constitutional change. Also, it would encourage more provinces to adopt this proposal, I think.

My second concern is with regard to the effect that the constitutional status of the Supreme Court of Canada will have on our assumptions about the relations between the three branches of government in Canada. I am worried that we are giving constitutional status to the Supreme Court without thinking through what role we want the court to play vis-à-vis the other two branches of government.

Many legal scholars have assumed that with the Charter of Rights and Freedoms, 1982, legislative supremacy is dead. I think this conclusion is too simplistic. Even before the charter, we recognized a conventional set of civil liberties which was supposed to limit what legislators could do. The difference was that the legislative branch of government had the final say as to the meaning of the conventional civil liberties. Now, supposedly, the Supreme Court of Canada has the final say because constitutional amendments to change judicial interpretation are so difficult. This reasoning is based on the American model. I do not think it applies entirely to Canada. I think the process of amending our Constitution is much more straightforward than the American process, and I comment on this in my notes.

Furthermore, it seems to me that in situations where the wording of the charter is not an issue, eight legislatures could simply approve an interpretative resolution which almost certainly would be followed by the Supreme Court of Canada, so that the cumbersome process of actually changing the wording of the charter might not always be necessary.

#### 1420

Back in 1981 when the charter was being developed, I was a sceptic about the charter because a bill of rights means nothing until the judges tell us what it means. Judges do not always interpret bills of rights as civil libertarians would want them to. However, our current Supreme Court is probably the most competent overall that we have ever had in this country and I have been favourably impressed with most Supreme Court of Canada decisions on the charter. What has impressed me is that the judges have raised both theoretical and practical issues about the implications of specific civil liberties, such as freedom of religion, the right to security of the person and so on, which otherwise might not have been raised or might not have been raised for a long time. Such issues deserve further consideration by the other two branches of government.

I have also noted how the judiciary has sometimes referred certain issues back to the Legislature and the executive for further consideration. For example, with regard to film censorship in Ontario and abortion, the judges have in effect said to the legislatures: "You have not thought through the procedures of what you are trying to do carefully enough. Consider the civil liberties issues more thoroughly and come up with a better set of procedures."

Right now these kinds of issues are considered primarily by staff in the provincial departments of the attorney general and the federal Department of Justice. What our political system is lacking is an effective method whereby the issues the judges have raised can be taken up again by the legislative branch and the general public. Furthermore, from time to time, the judges might interpret the Constitution in a less than desirable fashion. From my own perspective, I think the majority on the Supreme Court was wrong in not finding any protection of a right to strike in the freedom of association clause in the charter. I think this decision will lead to a great deal of labour unrest in Canada, as it already has in Alberta. I think the minority decision of the judges was better.

This kind of issue needs further consideration in the political process. It is unwise to leave the judiciary with the last word. Many and perhaps most of the concerns you have heard about the Meech Lake accord are worries about how the courts might interpret certain provisions of the accord. Ramsay Cook was concerned about how the "distinct society" clause might be interpreted. Mary Eberts was concerned about the potential erosion of women's rights. Quebec anglophones are concerned about the future erosion of their rights.

Professor Hogg has tried to quell these fears, but in the end no matter how clear the Constitution is, we do not know for certain what the judges are going to do with it. There is nothing sinister about this. Constitutions, by their nature, cannot be too specific. They need constant interpretation and reinterpretation. It is my opinion that this process of constant reconsideration of constitutional issues is likely to be most successful from a democratic perspective if it involves all three branches of government, as well as the general public. The judiciary plays a valuable and an essential role in constitutional interpretation, but I think the judiciary should not be the sole player or even the major player.

I would therefore recommend the establishment of a permanent standing committee of the Ontario Legislature on the Constitution. This committee would be charged with the ongoing consideration of constitutional issues. One of the duties of this committee would be to review important judicial decisions on the Constitution and to consider the implications of these decisions. The committee would hold public hearings about some of the most important and critical issues, such as whether freedom of association should imply right to strike in certain circumstances or the implications of a particular judicial interpretation of the "distinct society" clause.

In this way, the committee could encourage more public participation in the resolution of constitutional issues. If such a committee had existed before the Meech Lake accord was agreed to, we would not be in the bind we are in today: an agreement for important constitutional change and hardly any public input.

Because the Meech Lake accord is a fait accompli, there is a tremendous amount of bitterness and suspicion among certain groups. As I said earlier, the Meech Lake accord settles some long-standing disputes among the political elites in Canada. However, it has hardly touched the public perception except in a very negative way. The constitutional process has occurred



without much public input for so long that most Canadians do not have a very clear idea what the Constitution means. I realize this through teaching constitutional law at the university. The Constitution is becoming more and more a lawyer's document instead of a citizen's document.

Because the Meech Lake accord was announced as a *fait accompli*, this has caused the various groups which are concerned about the possible effects of the accord to take a very rigid position against the accord. In the eyes of the members of these groups, the legitimacy of the Canadian Constitution has been diminished. If broad public consultation had occurred before the premiers' meeting, I think many of the fears about the effects of the accord would have been allayed. Moreover, some of the imperfections in the accord, such as those pointed out by representatives from the territories, might have been corrected.

Another problem is that the accord is touted as bringing Quebec into the Constitution. What the accord actually does is to bring the majority of leading politicians in Quebec into the Constitution. I doubt very much if most Quebecers have thought about the accord all that deeply. If a pro-separatist government is elected again in Quebec, the pro-federalist forces will not be able to say, "Quebec has agreed to the Constitution." Quebec has not agreed; only a few politicians have.

A constitutional change of this magnitude, if it is going to have the symbolic effect desired, at least needs broad public participation in its creation. Ideally, it needs public approval in the form of a referendum. If Canadians actually voted for the Meech Lake accord, such a vote would be a much more important affirmation of the Constitution than the present process. How wonderful it would be if the majority of Quebecers voted in favour of our Constitution and the majority of the people in the other nine provinces voted in favour of welcoming Quebec into the Constitution.

Returning to the points raised by Mill and Rousseau, I think that the Meech Lake accord process has confirmed the fear expressed by Rousseau that without broad public participation in the constitutional process, many will lose respect for the law. Many Canadians have lost respect for our Constitution because they were excluded from participation in the Meech Lake accord process. Mill stressed the educative function of public participation. These public hearings are a great exercise in democracy and I

commend all of you for all your efforts and all your energy. One effect of the hearings is increased public knowledge of the Meech Lake accord. I think the educative process would have had an even greater impact if it had occurred before the premiers' meeting.

My final comment is that we have done the native people of Canada a great disservice by not agreeing to a constitutional amendment concerning native self-government as part of the Meech Lake accord. The native self-government amendment proposal was rejected at the constitutional conference last April because it was supposedly too vague. It seems to me, however, that the section of the accord which deals with immigration agreements is very similar to the kind of amendment many native groups wanted. In other words, if an agreement for self-government could be worked out between an Indian band and the federal government and the province, then the agreement could be constitutionalized, just like an immigration agreement. If the relevant provincial government could be included, this would be great, but if not, it would not be necessary.

In the Meech Lake accord, we in effect made a statement that we are more concerned about immigration to Canada than we are about Canada's first peoples. I hope your committee will produce recommendations which will lead to an early settlement of this very, very critical issue. Thank you again for hearing me.

**Mr. Chairman:** Thank you very much for your paper, which contains a number of very thoughtful suggestions. I am sure everyone on this committee would agree in particular with your point about the educative process and the Rousseau and Mill aspects of how important public participation is in lending credibility to what it is you are trying to do. I think we have been very conscious of that lack in the process that has existed to this point. We will turn to questions.

**Mr. Breagh:** I want to pursue something that I believe this committee is going to have to do, and that is talk about process after we deal with the immediate question of the accord. I think you are right, and I think many of us are in agreement, that it certainly would have been preferable if, for example, across the country legislative committees had talked about and made public, wordings, impacts, decisions and likelihoods, so that we were able to build a consensus before the decision was actually taken to put words into this accord which appear to

have an impact on the Charter of Rights and Freedoms.

**1430**

It would have been very nice to have been able to say definitively, "It isn't going to have an impact," or, "Here is our estimation of what the impact is," and to do that on a large scale. I do not know how many members share this concern, but I have some concerns that some rather learned folks have appeared in front of us with some rather paranoid notions about what constitutions are about and what courts are about. I think that is part of our job.

I specifically want to pursue a couple of other things you have talked about, one of which is the Supreme Court. I think all of us have to recognize that its decisions now are having political impact of a kind that we have not seen before in Canada. I was interested in again flipping through the Canadian Bar Association's report on how to do that.

For those who have not looked at this before, this talks a lot about qualifications, being suitable, being vetted and a committee of this, that and the other thing, but it does not talk about what the Americans do, which is to say: "We assume everybody has all those qualifications when they walk in the door. What we are interested in is, what kind of person is this? What kind of judgements will we get from this person if we put him on the Supreme Court of the United States?"

Do you advocate that some process of that kind should take place, that in addition to being moral and well-qualified, both of which are really difficult things to discern these days, somebody ought to go over nominees for the Supreme Court and say, "If you were to give us a judgement on the impact of the Meech Lake accord on the Canadian Charter of Rights and Freedoms, what would it be"? They would get an assessment whether there is a liberal judge being appointed here—excuse me for using that kind of language—or a very conservative person.

There is an obvious political impact on the appointment of judges. I am not talking about electing them, but people are trying to make the determination, "Is this person to the left or to the right?"

**Dr. Greene:** I am of two minds about that. That is an issue I have not myself made a final judgement about. On the one hand, I think it might be quite appropriate for a committee like this committee to interview the people who are on the short list produced by the nominating panel and ask them questions about how they

might approach certain issues, so that you get a judge who is broadly representative of the entire society and not an extreme right or an extreme left judge.

On the other hand, the reason this has not happened in Canada so far is that judges, up until now, have not had the last word about the meaning of the Constitution. If some of the suggestions I am proposing are taken up, they will be part of the process in the future but they will not have the last word, and so we would not need to worry so much about their ideological persuasion.

I suppose I prefer to have a judiciary composed of people who are qualified and impartial and not have to worry too much about their ideological leanings, because they are not important, because they do not have the last word.

**Mr. Breagh:** That is true, you see, and that has always been the Canadian assumption, that this is so nonpartisan it is just accident that Liberal governments always appoint Liberals to the courts and Conservative governments just appoint Conservatives to the courts.

Aside from that, the thing that bothers me just a bit is that in Canadian politics I have never seen a time, as we have seen in the last month or so, when a decision reached by the Supreme Court of Canada in one fell swoop sends governments across the country reeling as to what the appropriate reaction is to the decision of the Supreme Court. Our political system and our judicial process, which has always worked along nicely and smoothly and there were not any real jars in the system, has now had its first indication that there can be some very startling decisions made by the Supreme Court which put governments from one end of the country to the other flat on their patoots, so to speak.

Is there a danger in that, because in essence that is the result of appointing a judiciary with no concern as to whether they are left, right or whatever, that they will just be fair folks, are well-qualified and their decision has nothing to do with politics anyway.

**Dr. Greene:** I will approach that issue from another perspective. From my perspective, there is no excuse for governments in Canada being caught off guard by that decision. I fully expected the decision we got because the Criminal Code sections on abortion were so full of procedural holes that I think the decision was predictable, especially when you consider the other section 7 decisions of the Supreme Court of Canada.



If there had been a permanent standing committee of all legislatures in Canada to consider these kinds of issues, governments would not have been caught off guard and I think perhaps the various sections of the Criminal Code would have been improved before the Supreme Court decision.

**Mr. Breagh:** But the truth is they were, I would say without exception, caught unprepared; did not know what to say, did not know how to react and some of them still do not know how to react.

**Dr. Greene:** Yes. I think it is because we do not have an appropriate mechanism for the judiciary, the legislature and the executive all to have a part in constitutional interpretation.

**Mr. Breagh:** OK. Thank you.

**Mr. Eves:** I want to thank you for a very thoughtful presentation. You have made, I think, three very specific recommendations which I am sure the committee will take into account, at least one of which has been suggested on several occasions, that being a standing committee on the Constitution, which I think is as very good suggestion.

That deals with the process from now and in the future, but a few groups that have appeared before us have been somewhat more demanding, if you will, of the committee in their approach. That is really what I want to get down to in terms of the question.

For example, on the last page you indicate that representatives from the territories are not exactly pleased with several provisions: admission as a province, appointments to the Supreme Court, appointments to the Senate. The native people of Canada too feel they have been done a great disservice with respect to their pursuit of self-government and recognition of their rights. They have argued before this committee that nothing less than a change to the accord will give them their desired result. They also argue that if it is not changed now, the likelihood of its being changed with the unanimous consent of 11 governments somewhere down the road is slim to none, in their view anyway.

We have also had women's groups talk to us on their concern about section 16 and their rights under the charter; for that matter, a lot of them have been a lot broader than that, anybody's rights under the charter. They suggest that either section 16 should be amended, or at the very least this committee should recommend a reference to the Court of Appeal of Ontario to determine that issue.

Don Johnston, the federal member who was before our committee recently, agrees almost exactly with your stand that Quebec has not agreed, that only a few politicians in Quebec have agreed. He recommends nothing less than scrapping the entire Meech Lake accord and going back to the drawing board and starting all over again.

I would like to know what your thoughts are on amending the accord, scrapping it and starting all over again, or as some groups have suggested a reference case. What is your bottom line, or are you telling us that practically speaking you do not think the accord can be amended so the next best step is to proceed with your three recommendations?

**Dr. Greene:** I think that from a practical perspective there are not going to be many amendments to the accord, if any. Perhaps some minor amendments could be proposed, for example, so that lawyers and judges from the Northwest Territories and the Yukon could become Supreme Court of Canada justices and that sort of thing. Perhaps section 16 could be amended as some of the women's groups have recommended. Those are really fairly minor things and I doubt if there would be very many objections.

With regard to the inclusion of a native self-government clause in the Meech Lake accord, I do not think it is practical to amend the accord to include that particular section, but I think it is practical to start the process for another constitutional amendment. It would be appropriate for the Ontario Legislature to suggest another constitutional amendment which would give aboriginal Canadians the right to negotiate self-government agreements. That could go through the mill. Who knows, it may become a constitutional amendment before the Meech Lake accord does. I think that might be the most practical way of approaching that issue.

**Mr. Eves:** As a matter of fact, the Metis association that appeared before us yesterday, I believe it was, recommended a companion amendment which you may or may not have read.

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**Dr. Greene:** I read about that in the paper this morning and thought it was a very good idea.

**Mr. Eves:** I thought that was a pretty novel suggestion and a good idea.

**Mr. Elliot:** I too would like to thank you very much for coming. For me personally this has been a very good day because, without excep-

tion, the presenters, like yourself, have made very good suggestions with respect to process and other matters that they are concerned about. Not all of my days have been that good, because a lot of the people who come before us are very pointed in their concerns about various aspects of the accord, and I think this is very valuable input. Do not read me incorrectly on it, because I think that by recognizing how deeply people feel about things they feel are wrong with the accord, only by overcoming that will we make future endeavours better.

In particular, you specifically have made comments with respect to the three areas. With a little bit of background, I would really like to talk a little bit more about and get your ideas more about the unanimity clause, because it is not really that comprehensive the way it is in the accord. The way I read it, there are only about eight areas where that is required and there are still a lot of areas where the old amending formula is still in place, so it is not all-encompassing by any means.

The kind of flavour I would like to get relates to your particular background, coming from Alberta and actually admitting that you changed your mind on something. I know a lot of people from Alberta and I have not met too many who have changed their minds and see eye to eye with people from Ontario on a lot of things.

The veto power that Quebec thought it had until the Supreme Court decision knocked it down really is the intent, I think, behind why the unanimity clause came into being. Instead of having one province with veto power, we now have all of them essentially with veto power if they want it. The positive flavour you have given us here today, I would hope, the way I am interpreting it, means that they could get together on major things like bringing one of the territories into Confederation when the territory actually felt it was ready for it. Now, could you amplify on how you feel about the unanimity clause and, in the eight areas where it does apply, how that might be restrictive and whether or not it can be overcome, the same way you have commented on the other three things?

**Dr. Greene:** The unanimity clause is a logical outcome to the demands presented by Quebec, specifically the demand for a veto, and the demands of the western premiers, which are, "We will not give anything to Quebec that we cannot also have." Former Premier Lougheed spoke to one of my classes in September 1986, and in this class we took a look at the five demands from Quebec and asked him whether he

thought there would be a solution to the problem. He said, "No, because Quebec wants a veto, and we will not allow that unless we get a veto too, and it is probably not in the cards."

In my class we took a look at the five demands of Quebec and the position of the western premiers, and we came up with something that looked a lot like the Meech Lake accord. So I think it is a logical outcome of those demands.

In terms of the sections that are covered by unanimity, I think it is logical that most of them should be covered by that procedure. I do not think it is going to hamstring us very much. The one thing that concerns me is the admission of new provinces into Confederation. I think it is appropriate to give Quebec a veto power over that issue. I do not think it is necessary for any other provinces to have a veto power. That is a constitutional change that could be considered in the future, and perhaps the western premiers would back down on that; I do not know.

**Mr. Elliot:** Could I ask a supplementary, please?

**Dr. Greene:** Please do.

**Mr. Elliot:** It is because of something you said part-way through with respect to your class sitting down and coming out essentially with the Meech Lake accord. For the record, I think one thing that has not been talked about enough is the fact that Meech Lake just did not happen and then, three months later, it was finalized. The people I talk to on the street do not really understand the way a conference like that at Meech Lake evolves. In actual fact, they do not understand that there were groups of people in all the provinces and federally working for 18 months before that meeting, and there were specific things on the table that were going to be discussed by negotiation. They were not acceptable to everybody, so everybody went away for another three months, and there was substantial change before the final document was signed on June 3.

I think that kind of thing is very important, and if someone in a class like yours sat down and essentially came through the same kind of deliberations and came up with essentially the same kind of thing, maybe we should be concluding that it really is not that bad.

**Dr. Greene:** That is my conclusion. The terms of the accord, I think, are not all that bad. At seven o'clock in the morning the day after the accord was announced, I was phoned by a radio station. They wanted my reaction. Two minutes earlier I had read the three paragraphs in the



newspaper about it. I said, "It looks like a good first draft to me."

I think it could have been improved. The major problem with the accord was the process. It is an exercise in élite accommodation. As you say, many people were involved in working out the terms of the accord and many constitutional experts across Canada were involved in that process. What it lacked was public participation, and so the result has been a tremendous amount of bitterness among some groups.

**Miss Roberts:** I have just a very brief supplementary. To me it is amazing the change in the procedure: there is no longer the veto power; all the provinces are equal. That is a great concern, because here we have the Meech Lake accord, in which we have 11 premiers agreeing. How did that ever occur? What was there that made those 11 people come to that agreement? People fear the future, but I cannot understand how these 11 got together at this time, and again and again and again. That is something we must consider as well. Do not fear the future as much as—

**Dr. Greene:** I agree with you. I think that constitutional change in Canada is not as difficult as some people would have us believe. We have regular first ministers' conferences. These people get to know each other after a while.

**Miss Roberts:** If they stay around long enough.

**Dr. Greene:** If they stay around long enough, yes.

**Mr. Breaugh:** Do not rub it in.

**Miss Roberts:** I am sorry; I did not—

**Dr. Greene:** They think in bargaining strategies. There are constant meetings of officials from across the country who work out compromises. It is the whole process of executive federalism that other people have discussed with you, and it works in many ways. We can get these agreements. The only thing lacking is public participation.

**Mr. Chairman:** One thing that has been very clear throughout all of our hearings is that the lack of public participation, whatever the other merits were of the process, has perhaps in some ways caused the greatest damage to the acceptability of the accord, to the point that this problem may still cause the accord not to be accepted. We have only to look at the events in Manitoba, potentially, to see what might happen. As Mr. Breaugh says, we are going to have to address that question very seriously in our report.

I want to thank you very much, on behalf of the committee, for coming this afternoon. We appreciate your presentation, the answers to our questions and also the material from the Canadian Bar Association.

**Dr. Greene:** Thank you very much for having me.

**Mr. Chairman:** I would now ask the representatives from the Women's Centre at the University of Toronto, Lisa Freeman and Valerie Heskins, if they would come forward. I want to thank you very much for joining us this afternoon. We all have a copy of your paper. If you want to make your presentation, we will have a period of questions afterwards.

#### WOMEN'S CENTRE, UNIVERSITY OF TORONTO

**Ms. Heskins:** The University of Toronto Women's Centre is a feminist collective dedicated to the improvement of the status and condition of women at the university. We appreciate the opportunity afforded to us by this committee to express our concerns on a matter fundamental to these aims: the constitutional amendment, hereinafter referred to as the Meech Lake accord.

Canada is a large, heterogeneous country, fraught with regional and status group divisions. While the Meech Lake accord is an attempt to remedy the regional divisiveness of our country, it has further exacerbated the potential for status group inequalities. We at the Women's Centre at the University of Toronto are primarily concerned with the effect that this accord will have on the status of women in Canada. We are disturbed by the way the proposal was formulated and the resulting vague wording of the accord. However, in the interest of brevity, the University of Toronto Women's Centre will address itself to the following four issues: the process by which the accord was drafted, individual and equality rights, opting out and the north.

#### 1450

**Ms. Freeman:** The process: the process by which the Meech Lake accord was drafted blatantly defies the participatory nature of Canada's democracy. There has been a minimum of informed public debate around the accord. What is at stake, a fundamental alteration of the nature of our country, is either unknown or not fully realized by most Canadians. We strongly object to the stipulation that all 10 premiers and the Prime Minister must agree for an amendment to pass. This turns these hearings into a virtual farce. The fact that Prime Minister Mulroney could effect such a significant change without

consulting the people of Canada is simply a travesty of the democratic process. Hence, we urge that this committee make recommendations based on these hearings to the Legislature before the accord is ratified.

**Ms. Heskins:** Individual and equality rights: our principal concern as Canadian women is how the Meech Lake accord will affect the equality between the sexes. The accord also affects the rights of age, sexual orientation, religion and mental and physical disability. As women can be elderly, lesbian, any religion and mentally or physically disabled, all of the above rights are important to us. Furthermore, as feminists, we are liberationists and thus are concerned about the rights of all.

Frequently, the vocalization of the concerns of women, to paraphrase journalist Lysiane Gagnon, is seen as a Trojan Horse constructed to attack the gains which Quebec has achieved in the Meech Lake accord. This is simply not the case. The "distinct society" clause is not in conflict with a call for any equal rights provision. Individual and equality rights, in and of themselves, should not be controversial. Equality, as one of the fundamental precepts of liberal democracy, should be enshrined in the Constitution as a matter of course. The Meech Lake accord must be renegotiated to include a provision ensuring that the Charter of Rights and Freedoms prevails in any contradictory wording.

The focus of the debate with regard to the individual and equality rights centres on the exclusion of native and multicultural rights from a linguistic and "distinct society" provision set out in clauses 2(1)(a) and 2(1)(b) of the amendment proposal. It is often argued by proponents of the accord that it is not the intention of the amendment to override the individual and equality rights and freedoms under sections 15 and 28 of the Charter of Rights.

Unfortunately, one need not look very far back in Canadian case law history to discover that it is the letter of the law and not its spirit which prevails over time. Even with its explicit provision for equality to protect the disadvantaged, the charter has been used against those for whom it was intended to secure justice. Judges are defining the gender equality rights in section 15 of the charter very narrowly and with little regard to the provision of section 28, which emphasizes the fact that charter rights apply equally to male and female persons.

Yet in a recent review in *Broadside* of how section 15 has been used, it was found that 12 cases concerned men charged with sexual of-

fences and six cases involved men seeking equal benefits from social assistance or family law. A scant 10 per cent of the cases promoted the equality of women. The outcomes of these cases show that men rather than women seem to have gained more from the laws that are instituted to protect their rights.

Clearly, Canadian women in particular and justice in general cannot be made to rely on the sensibility and adeptness of the courts in judging when and where the spirit of the law should prevail over the letter of the law. As it stands now, the Meech Lake accord, because of its imprecise wording, endangers the provisions for individual and equality rights by allowing for the possibility of their overriding by the "distinct society" clause.

Constitutions are meant to protect the country's citizens from the worst governments. For the status of women, possible worst-case scenarios made possible by the accord include, for example, a decision by a future Quebec government, fearing a decrease in population and hence decreased political power, putting incentives in place for women to adopt traditional child-bearing roles; or a rerun of the Lavell case of 1974, in which it was ruled the federal government had the constitutional right to ensure the interests of a group over a woman's equality. Clearly, the implication of the exclusion of rights other than aboriginal and multicultural rights is grave, and it is tantamount to establishing a hierarchy of rights, a notion which is completely unacceptable.

The University of Toronto Women's Centre advocates the deletion of section 16 and the provision that the Charter of Rights take precedence over the accord. We feel that another alternative is to add women's equality rights in the charter under sections 15 and 28 to section 16 of the accord.

**Ms. Freeman:** The opting-out clause: one of the pillars of our national identity is the communitarian orientation of our society. The most blatant manifestation of this is our array of social programs, ranging from medicare to pension plans to partially subsidized day care. Prior to the Meech Lake accord, the social programs were funded by both federal and provincial governments under a national cost-sharing scheme. Even then the provinces had a great amount of leverage with the money. Witness Bill Bennett's cutbacks of 1983, wherein he purloined \$16 million from the public school system and transferred it into the private schools.



However, prior to the Meech Lake accord, a province was still bound to carry out certain social programs, such as medicare and the Canada assistance plan. After Meech Lake, the provinces are now able to opt out of national shared-cost programs. The conditions, however, are very vague. The new provision states that the federal government "shall provide reasonable compensation to...a province that chooses not to participate in a national shared-cost program...in an area of exclusive provincial jurisdiction, if the province carries on a program or initiative that is compatible with the national objectives."

This concerns us greatly as women because all women need these services, particularly single mothers, battered wives, pregnant women and sex trade workers. This concerns us as university students because the universities are underfunded as it is. If the provincial governments opt out of national cost-shared funding, the first programs to be cut will be ones like the transitional year program at the University of Toronto and other part-time programs. As the majority of the users of these programs are women, this greatly concerns us.

We are not proposing that the provincial governments will definitely be less prepared to fund social service programs. We simply object to leaving the possibility open. Premier Bill Vander Zalm's recent defiance of the Supreme Court decision on abortion is a good indication of the possibilities in store for women now that the provinces can opt out.

This provision, while it might placate individual provincial governments, contributes to already existing regional inequities. This is simply unjust. Canadians have the right to expect the same level of service as other Canadians, regardless of their province of residence. Furthermore, nowhere is the term "national objectives" defined, and there is an absence of standards indicated with which to meet these undefined national objectives.

In light of this, we suggest two alternatives. The first is very simple: delete the provision from the accord. The second would take much more effort, would not likely get provincial agreement and may even be unconstitutional. However, it is only a suggestion. The opting-out provision would be acceptable to us if the following amendment were to be added: that any provincial government which chooses to opt out of a national cost-shared program is required to set up a federally funded task force in its province, the focus of which will be the particular service out of which the government is opting. Furthermore,

the provincial government should be bound to use the briefs submitted by the task force as a guideline for its actions.

**Ms. Heskins:** Another issue we would like to express our views on is the question of the impact of the accord on the north. One reason we feel the need to speak out on this topic is that, aside from the recent Senate recommendations, the issue has received little publicity in comparison with the gravity of the issue.

The effect of the Meech Lake accord on the north has accurately and eloquently been described as a constitutional Yalta which has the effect of preserving the political status quo and effectively freezing the territories out of the opportunity of attaining provincial status.

It has been proclaimed numerous times in the media that Canada is now a whole nation: but is it? The territories, making up one third of the Canadian land area, have been effectively excluded, perhaps forever, from belonging to Canada in the fullest sense. In a time of increased awareness regarding Canadian sovereignty in the north, the exclusion of representatives from the territories from the meetings which led to the proposed amendment seems inappropriate at best.

No other region of Canada had to overcome the possibility of one province vetoing its opportunity to gain provincial status. Taking into account the large aboriginal population of the north, this development is also effectively racist.

From the strictly numerical standpoint, this measure is by no means fair or democratic. Alone, the smallest province, Prince Edward Island, with its population of 100,000, could affect the future of the north and hence of Canada through its privilege of veto.

**1500**

**Ms. Freeman:** In closing, we would like to reiterate our suggestions. First, we urge you to make amendments to the accord before it is ratified by the provinces, thereby rendering these hearings constructive rather than gratuitous. Second, we suggest that a provision be added to the accord which affirms the prevalence of sections 15 and 28 of the Charter of Rights and Freedoms over any potentially conflicting clause in the accord. Third, we feel that in light of the importance of our social service system, the opting out clause is unacceptable as it stands.

Finally, the under-representation imposed on the northern territories is unjust and must be reversed by allocation of a vote in the amending process to each territory.

**Mr. Chairman:** Thank you very much for your presentation, which is very clear and specific in terms of the points that you raise and the recommendations. We turn now to questions. I have Mr. Keyes, Mr. Eves and Miss Roberts.

**Mr. Keyes:** Thank you very much, Mr. Chairman and I thank the ladies of the women's centre. I think it most appropriate that you gave us the other fill-in document because reading quickly through this one left us with a lot of gaps in understanding what you were getting at; and perhaps the committee would even appreciate copies of what you have presented there, although we can get it from transcript later.

I wondered if you wanted to flesh out a bit more, and I may have in my pre-reading missed them, just some of the ways you suggested in the process aspect of dealing with the amendments, because also within those other two areas, there is the process on how you feel it would have been more appropriate and what should we do in the future to make the process more meaningful. The second question then was when you talked about it you put it inside the area under individual and equality rights. I gather you were making a plea for a total change in the form of electing our government in Ottawa and you are making a case for proportional representation, somewhat similar to some other groups that have suggested adding additional seats or some method that would try to reflect in government the support that each party has across the country. Those are the two areas I want to address first.

**Ms. Heskins:** I will address the first part first. In terms of the process, since the last four years of the Trudeau government task forces have been in commission and I think they have been very effective. They have allowed groups such as ourselves—I mean this is something like a task force—to present their beliefs and their research to the government. That fits right in with the participatory nature of Canadian democracy which is getting less and less participatory, but task forces bring it back. I think for the Meech Lake accord, a task force would have been a good method of involving Canadians in the process.

In terms of the second part of your questions, we did not say anything about electoral reform and I am not even sure that I would agree with it because there are problems with list systems, although people have—William Irvine, for instance and Ed Broadbent for that matter—suggested various forms. There are other ways of making a national party integrative and regionally representative. One of them is something like the Ministry of State for Economic and Regional

Development that Trudeau implemented in 1982 and everything that went with that, the FEDC, and DRIEs etc. To me, that was an excellent indication of the government at least attempting to involve regions in national economic policy. There are different ways of decentralizing power, that is one of them. The other is simply allocating part to the provinces. I do not see that as a good method.

Also, John C. Courtney has an article in the Macdonald report, where he comments on the amalgam method and the size of the House. In terms of electoral reform, that is one method where the size of the House simply increases and the regional representation of each party increases in proportion to the size of the House.

**Mr. Eves:** I believe you may have already answered the question I was going to ask at the end of your presentation. I note the concerns that you have with respect to the accord. Assuming for the moment that this committee and other elected bodies across the country were able to address your concern about the process, especially in the future, and to make requisite amendments with respect to equality rights, section 16, the territories, native groups, your concern about the opting out clause seems to be a fairly fundamental concern with the accord to me. At one time there was a discussion of using the wording, "national standards" as opposed to "national objectives" and that was subsequently changed at the insistence of one or more provinces. Would you be happy with such an amendment or do you think that your concern is so basic about the ability to opt out that even that would not satisfy you?

**Ms. Heskins:** It would depend on how these standards came about, how that was decided. I mean I think that is something that would need a lot of study.

**Ms. Freeman:** If it were a matter of simply changing the word from "objectives" to "standards," it would be a matter of semantics and therefore it would not appease our objection. No, I think the opting out clause either has to be deleted; or as we suggested that the provinces be bound to implement task forces which are federally funded and go by those suggestions.

In a province like Ontario right now, it is not very much of a problem. The government are Liberals, but they are fairly progressive; however, when you get into a province like British Columbia, it is a problem.

**Mr. Keyes:** The liberal progressive party.

**Mr. Eves:** This could be the forming of a new party here.



**Miss Roberts:** If I might just carry on from the comments with respect to the opting out. You seem to consider it an opting out provision. You realize when you read through that it deals with only programs that are the exclusive jurisdiction of the province and that come into effect after this is passed. So it is not going to deal with any programs that are in existence now, it is programs we might be concerned about in the future and it does not deal in areas where the area can be filled by both federal and provincial. It is only an exclusive jurisdiction. Those are things that you have to consider and realize that it is much narrower than you seem to feel that it is, although maybe in the future there may be other programs that come up that are exclusively provincial to concern yourself about. That is one thing I would like you to think about.

The other thing I would like you to address your minds to right now is section 2, the "distinct society" clause. You spoke of that in some ways. What is your concern about Quebec? Do you think we should just go back to the drawing table completely with respect to Meech Lake, or is there something in Meech Lake that addresses a problem that one particular province had?

**Ms. Heskins:** We do not really have any quarrel with the fact that Quebec is a distinct society. We also believe that the north and those aboriginal peoples—and we follow the Senate's guidelines on that—should also be made a distinct society. That should never overrun an individual's rights ever.

As we have said, we want to recommend that the Meech Lake accord, the distinct society, will not override the Charter of Rights and Freedoms.

**Miss Roberts:** You realize that section 1 of the Charter of Rights and Freedoms explains that the individual rights are already tempered by what is in—

**Ms. Heskins:** But with the fact they are saying, "OK, especially not these rights can be overrun by this 'distinct society' clause." That basically leaves the other ones more or less open to judicial interpretation.

**Ms. Freeman:** If I might add to what Val has said, there are problems with the "distinct society" clause. However, they do not concern us directly as women of the University of Toronto Women's Centre.

**Miss Roberts:** So you have not addressed them.

**Ms. Freeman:** If I were to address them, it would be my personal beliefs, not the beliefs of the centre.

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**Mr. Allen:** I think it is very important that organizations representing women in the province lay their views before us as frankly as they possibly can, because they are quite aware of the some recent gains that have been made, not all of them perfect by any means. During the last Legislature, pay equity legislation for example, gets us some way down the road, but not as far as we would like to get on that front. So I think we have to listen with both ears when we hear you bringing questions about the Charter of Rights and Freedoms before us, for example about the way the courts have applied it.

One of the questions I want to ask you in that regard is that I think a pretty consistent position that has been laid before us by women's representatives has been that section 16 should be abolished and that the priority of the charter should be affirmed before we proceed with Meech Lake. I was not quite sure whether you were giving us that message or not when you told us that in fact the court cases under the charter, even under the equality section, were not resulting in fair judgements that promoted the equality of women. Does that tell me you have some reservations about the idea of the priority of the charter because it was relatively ineffective because of the way it is applied in the courts? Am I misreading something or do you want to amplify that question of priority of the charter?

**Ms. Heskins:** That was mainly to buttress the point that we think it should be said specifically that these rights should be enshrined because of what can happen and what has happened with the Charter of Rights and Freedoms. That has been interpreted very narrowly, and we just do not want to see that slide even further back. I mean, we are being realistic. Personally, our centre does not intend to try and go after the Charter of Rights and Freedoms. That would be very hard to change at this point.

**Mr. Allen:** But you are not all excited about it, apparently.

**Ms. Heskins:** And also, you cannot do much more than what is actually down there anyway.

**Ms. Freeman:** To add to that, when you say we are not all that excited about it, in a capitalist society we need to enshrine the rights of the individual because the rights of the individual are constantly being endangered. However, ideally, the rugged individualism that comes from a negative notion of liberty, such as is entrenched in the Charter of Rights other than certain clauses like affirmative action, is not ideal, is not

something that we advocate. However, given that we do live in a capitalist-liberal democracy, we need the charter. We just have some ideological problems with the way the entire society is set up. You know, we could blow up Queen's Park or something but we cannot change it very quickly.

**Mr. Chairman:** We appreciate you have not done it.

**Ms. Freeman:** They did not check me when I came in here.

**Mr. Allen:** No, it is not an uncommon observation that in a society where there is some fundamental maldistribution of property, wealth and power, that when you set up a charter based on individual rights, the likelihood is that the courts, in fact, will end up being accessed more readily by those who have the power and the status and the wealth. Therefore, you do get consequences that were not intended ideally or even ideologically in the Charter itself or even perhaps by the court, or the justices, but that is the way it plays out. I understand what you are saying and I am very sympathetic to that, but it would seem to me to modify this earlier position that we have been hearing, which was if we simply drag the Charter in there and say it takes priority, that whole problem would be solved. You are saying it is not simple, and I hear you, I think that is an important thing to have said.

Secondly, your whole presentation stresses the importance of process and democracy and participation. I like that. There was only one note that sort of confused me somewhat, and that was when in your brief—you did not amplify this in your statement—you noted that now you would have to lobby 11 governments instead of one.

It just struck me that on the other hand, you were very favourably disposed to task forces. So, I have some two visions of the future: one where you might only have to go to one place to get your voice heard, but on the other hand a vision of the future where you would be going all over the place, not just to 11 but perhaps hundreds and hundreds of places to have to say what you wanted to say. I just wondered am I missing something or whether there is a contradiction there; or what we have got.

**Ms. Freeman:** When I was addressing Mr. Keyes's question I think we backed him into it also; but yes, if the federal government merely allocates power to the provincial governments then we are in danger, because the provincial governments are not obligated to their constituents to have task forces and to continue on with the participatory tradition of Canada's democra-

cy. They are only accountable to the electorate in terms of getting voted in again, and that is a problem in itself as democracy does not seem to be working so well these days.

However, it is important that the national government is not capable of answering all the needs of all Canadians, because we live in such a large, heterogeneous country. Therefore, power must be decentralized. However, to decentralize it to the provincial governments and stop there is not enough. It has to be decentralized even further so that local community groups can get involved and a proliferation of worker-run businesses might occur. When that happens, task forces are very valuable.

As long as the provincial government is bound to certain rules of conduct, it is a very good forum for people to express their wishes about their own country.

**Mr. Allen:** Finally, do I gather that your final bottom line on the accord is that if it is not amended in certain directions which you have noted, we might as well simply abandon the whole process or start all over again and scrap the deal, or are you going that far? Are you saying: "These are things we ideally ought to do, but if we cannot get them now we have to get them later. We could put up with the accord if that was the way it worked, later being better than nothing"?

**Ms. Freeman:** I think if we do not get them now, our chances of getting them later are significantly reduced.

**Mr. Chairman:** I wonder if I could just ask you one question. One of the issues that comes up when we are looking at the question of individual rights—and I appreciate the points you have made about the importance of individual rights—is that another aspect of our country, particularly in the case of the French Canadians who are in their largest numbers in the province of Quebec, forming a majority, for them there has to be some concept and understanding of a collective right, and that there may be a problem at times between what they might see as the necessity of collective rights versus individual rights.

We have been grappling with why section 16 simply did not say that the charter should have priority; not necessarily section 16, but some other statement in the accord that just underlined that. One of the possible reasons that did not happen was a concern that Quebec might have in terms of how that might affect what in their judgement were perfectly legitimate collective rights.



I do not have an answer to that and I do not even know if that is a valid reason why section 16 is framed the way it is. I am just wondering, do you see a place in our country where we have the two official languages where there is a place for protection of collective rights in some respects? Is that a valid notion in your understanding of individual rights and collective rights?

**Ms. Freeman:** It is a very valid notion. If we thought that it was not a valid notion, then we would not advocate affirmative action for women, for instance. Of course it is essential.

I agree with you, it is a problem, one that I have problems resolving too, because on the one hand there is a culture and on the other hand there is a certain standard of liberty that we have become accustomed to and expect, and when they clash it is very difficult. You end up being very anglocentric, to say, "This is right and this is the way it should be." So it is a problem I have and it is a difficult one to resolve, but I do see a need for collective rights.

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**Mr. Chairman:** I empathize with the way you worked your way through that as well. I think it is a problem that we all have in that sense of wanting to have certain clear, distinct rights as individuals, yet in a country such as ours recognizing the need as well in different areas of collective rights.

I want to thank you very much on behalf of the committee for coming this afternoon, for making your presentation and for answering our questions in a very frank and full way. We very much appreciate the time you took in preparing the presentation and coming and joining us this afternoon.

I now call upon Roberta Need, Martin Shulman and David Sloly to please come forward and make their submission. We have received a copy of your submission, and I think that has been circulated to everyone. I will just note for the record that you have given me a copy of Eugene Forsey's analysis of the report of the joint committee, and thank you for that.

I would like to welcome the three of you to our meeting this afternoon. As you are undoubtedly aware, we provide you now with an opportunity to make your presentation, and we will then follow it up with questions. Please proceed however you have decided among yourselves.

ROBERTA NEED,  
MARTIN SHULMAN,  
DAVID SLOLY

**Ms. Need:** We have passed out a document and we feel, because of the nature of our

argument, it would be best if we stayed with the presentation.

**Mr. Shulman:** Just prior to starting that, I think there is one thing I would like to say, because we are here as individuals. We take this thing very seriously and there are a few things I would like to comment on.

Number one, we do appreciate the fact that the members are here, that the committee has been set up and that we know everybody here takes this task very seriously. However, one thing I would like to comment on is that this set of hearings is in essence very much a farce, like the federal hearings, because the Premier has already stated that he will not accept amendments. We are not happy with that. This has no reflection on the members here or on the work of the committee; however, we are upset that this position has been taken prior to the committee's hearing presentations and making its final recommendations.

Although this may be a bit of a futile process, we believe that just maybe something can come out of it. If nothing else, we would at least like to get into the record some historical "I told you so's" for down the line.

**Ms. Need:** "The People of Canada Versus the Governments of the Provinces":

It is the intention of the authors of this paper to concentrate on the effects of the 1987 constitutional amendment on the individual citizen of Canada. We are the first to agree that the amendment has a negative impact on the rights of Canada's original inhabitants, minority groups, women, and the two territories with their aspirations for provincial status. It is also recognized that the transfer of powers from the federal to the provincial level weakens the ability of Canada to act in a cohesive and consistent manner.

The absurdity of the piecemeal approach to Senate reform, which in this case merely transfers the right to make patronage appointments from the federal level to the provincial level, is also recognized as inadequate. We are also concerned with the unanimity principle surrounding future constitutional amendments in specific areas. It is our contention that this merely prohibits future amendments from being made. However, what concerns us the most is that few people have spoken out on the impact of this amendment on the individual citizen in Canada. For this reason, we wish to address ourselves to the "distinct society" clause of this amendment and its impact on the individual citizen.

We are individuals. It is true that we can identify ourselves as part of a minority or majority group. It must still be recognized that by and large we live and act out our lives as individuals. When we have concerns about the impact of government policies and actions, they are based on their impact on us as individuals. This is true for Canadians in Newfoundland, Quebec, Ontario, Saskatchewan or the Yukon Territory. Now let us turn to the issue at hand.

During the 1960s, a royal commission released a report that defined what most of us have come to accept as the two most distinct characteristics of Canada. The first is that Canada is a multicultural society, and the second is that we are a bilingual society. Most Canadians accept this reality, although a few still persist with their belief that we should be a unilingual, unicultural country. This view is outdated and backward-looking. We choose to look forward with the recognition of our bilingual, multicultural reality.

The adoption of official bilingualism came too late to stem a rising tide of separatism among Quebec's French Canadian population. After all, bilingualism merely provided equal access to the services provided by the government of Canada as well as providing equal access to participation as employees within the federal civil service. French Canadians were protesting against their unequal treatment within the work world within the one province where they were and are the majority population.

To set matters right, successive governments in Quebec threw off the economic and education policy blinders that were the norm during the Duplessis era. Technical and business education took their rightful place in the education systems of Quebec. Linguistic and cultural laws were passed that reversed the old system whereby French-speaking Canadians not only left their families at home when they went to work but also their language and their culture. In modern Quebec, French is the language of work, play and government.

Separatism still continued to rise in Quebec and reached its peak in 1980, when 40 per cent of the population of Quebec supported the referendum calling on the government of Quebec to begin to negotiate sovereignty-association with the rest of Canada. We all know that 60 per cent of Quebec rejected this view and unequivocally opted to remain within Canada as equal participants in Confederation. When the results of this referendum were announced, the then Prime Minister, Pierre Elliott Trudeau, started to devise

plans to renew our Confederation by striking a new deal for all Canadians.

To provide the kind of protection and power required to make Canada bilingual and to promote the new reality of multiculturalism, the Liberal government turned to the Constitution and the old Canadian dream of patriation. For over 50 years, successive Canadian governments had made the effort to put control over our Constitution into Canadian hands. For over 50 years, federal governments were stymied by demands from the provinces over the amending formula for a patriated constitution. Quebec governments feared that Canadian control over the Constitution would result in a constitutional amendment eliminating or reducing the status of French guaranteed by the British North America Act. This would constitutionally achieve what was already happening in everyday life for French Canadians.

The problem was that French was not used in the workplace in Quebec because employers, the majority of whom were English-speaking, would not allow French to be the language of work. French governments felt helpless in the face of this decline in the status of French in Quebec and in the nation as a whole. For years they ignored this growing problem and relied on the constitutional guarantees to protect the French language. This was an inadequate approach, and eventually the whole problem of French-language use had to be addressed through looking at practical means of achieving what the Constitution guaranteed.

The solution to this French-language status problem proved to be simple. The question facing the Quebec government was, did they have the power to protect the cultural and linguistic rights of their French-speaking populace? Little did Quebec governments realize that they had always possessed, through the legislative process, the power to increase the stature of French in the province. For those who doubt this reality, one merely has to turn to the language laws introduced by premiers Bourassa and Lévesque. They did not require new constitutional powers to achieve a rebirth for French in the province's workplace. Legislation and the will to make it work have resulted in the current status of French in Quebec.

The implementation of bilingualism on a national scale has resulted in changes in the entire nation. The advent of French in the nation as a whole rivals the new stature of French in the province of Quebec. This is most clearly demonstrated by the continually rising enrolment of students in French immersion programs.



Canadian parents have turned to French immersion as the obvious answer to their concerns that their children must be able to live and operate in both official languages in Canada. The demand for French immersion is so great that school boards are unable to meet the growing demands of the students they serve. This not only reflects the growing use of French in Canada as a whole, but it also reflects the growing acceptance and support for official bilingualism and increased French-language usage in Canada.

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This growth in the stature of French in Canada did not eliminate the need to protect French within the Constitution, but it shifted the focus dramatically. By utilizing existing legislative powers, the provinces have the means to address linguistic and cultural concerns in a forceful and effective manner. In fact, the issue that emerged was, how do the people of Canada, as individuals, protect themselves from the powers of the governments and institutions created through the Constitution? It must be remembered that governments are the creations of constitutions and constitutions are created by the people of a nation. When turning power over to governments and institutions, the people must have a means of defending themselves from abuses of this power. Power is only granted to a degree. The individual retains for himself or herself certain rights and powers that do not have to be given to governments.

To protect oneself from these problems of overstepping the bounds of legally constituted power, individuals must be able to challenge their collective creations and have these challenges addressed seriously and meaningfully. Prime Minister Trudeau saw in this checks-and-balances system the perfect means to address the whole issue of protecting French language rights. The Charter of Rights and Freedoms provides each person in Canada with the means to protect himself from infringements on his rights and freedoms by the governments of this land. This same document also gives each person, whether he is French- or English-speaking, the power to protect his linguistic and cultural rights through court challenges to the actions of governments, employers or other individuals. In short, French language rights are protected in our Constitution. The real problem is that we have approached Constitution building backwards.

In an ideal situation, the powers of the individual would be protected prior to the creation of the institutions empowered to wield the collective rights of society. In Canada, these

institutions were in place prior to concerns over the rights of the individual being expressed. When Prime Minister Trudeau chose to grant back to the individual the powers that should rightfully have been ours, he met with stiff opposition from the provinces. They felt that they were the natural body to entrust with the means to balance the powers of the federal government. Instead, they found themselves lumped in with the federal government as an institution that must be scrutinized in relation to the rights of the individual. Individuals were given the means to check the collective powers of all governments in this nation. This is a situation that provincial governments did not and still do not like.

The proposed 1987 constitutional amendment forces upon us a backward-looking vision of Canada. Behind the guise of bringing Quebec into the Constitution, the amendment undermines the gains made through the adoption of the Charter of Rights and the implementation of bilingualism. It is incorrect to state that Quebec is or was not a part of the Constitution. When the Constitution was patriated, Quebec was not exempted from its provisions because it did not agree. A separatist government came to the Constitution talks determined to oppose any deal. There should be no surprise that they ended up opposed to the patriation of the Constitution in 1982.

What is surprising is that within four years of achieving the elusive dream of patriating the Constitution and completing the process of achieving independence, Canadians find their Prime Minister and the 10 premiers trying to amend a system that has not been given a chance to work. While the courts are busy trying to bring into line the laws of the land that violate our individual rights, our so-called leaders are trying to steal these rights back from us. In a blatant grab for power, the Prime Minister and the provincial leaders have agreed to grant unto the legislatures of this land the right to define and inhibit the natural growth and evolution of culture. While they choose to call this an accord, we recognize it for what it is: a lust for power and the theft of our rights as individuals.

Provinces are now constitutionally granted powers to preserve the existing linguistic demography of our nation. Little thought has been given to the fact that bilingualism, immigration, economic growth and individual choice might lead to a natural change in our status quo. With this amendment, natural change will be prohibited. What is labelled as "a fundamental character-

istic of Canada" is in reality a snapshot of this particular moment in time. Any student of Canadian and world history knows that linguistic demography can and does change with time. It can be logically argued that provincial governments will now have the power to prohibit the growth of bilingualism and French-immersion education to preserve the "fundamental characteristic of Canada." Individuals will find themselves powerless to make decisions that should be, and currently are, their right to make.

As if this preservation of linguistic demographic status quo were not bad enough, we are also confronted with a second and more dangerous assault on our rights and freedoms as individuals. Within this amendment, we are told that "Quebec constitutes within Canada a distinct society." We are not prepared to argue with this point. It is true. It is also true that Ontario constitutes a distinct society; Saskatchewan constitutes a distinct society; Prince Edward Island constitutes a distinct society; Toronto constitutes a distinct society; and so on and so on. What is repugnant about this constitutional amendment is the inclusion of subsection 2(3). This section states, "The role of the Legislature and government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph 1(b) is affirmed."

This not only creates inequality and accepts the ridiculous notion of two Canadas, it also grants to the government of Quebec the power to define and shape its version of Quebec culture. It grants a power that no other province has and will create second-class citizens in Quebec. This "distinct society" clause means that the Legislature of Quebec will not only have the power to pass legislation designed to preserve the status quo but they will also have the power to force their version of Quebec culture upon a defenceless populace. A once living and evolving dynamic will be subjected to the stultifying process of being interpreted, frozen and forced on the people by legislators. The excesses that will inevitably flow from this power will be unchecked because the Charter of Rights is superseded by this amendment. Quebec's government will have the power to define what is or is not a desirable component of culture. The individual will find himself or herself an unwitting pawn in the game of cultural interpretation.

What is most vulgar about this whole exercise is that it insults the people of Quebec. All Canadians are being told that the individual in Quebec is incapable of shaping and creating his

own culture. They are being told that instead of having a Charter of Rights in place to check the unwarranted excesses of the federal and Quebec governments, they will be protected by granting unto their provincial Legislature new powers that are unchecked in any way. Individualism will be replaced by condescending provincial cultural interpretation.

An insult such as this cannot go unchallenged. Inequality such as this cannot go unchallenged. Not only are the people of Quebec, as individuals, subjected to the same preservation excesses as the rest of us, they are also subjected to new provincial powers that leave them more vulnerable and unprotected. The negation of the Charter of Rights and Freedoms will thus be more strongly felt in Quebec than in the rest of Canada.

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To state that opposition to the 1987 constitutional amendment is anti-Quebec is absurd. Quite to the contrary, support for this amendment is anti-Quebec. Specifically, it negates the rights of the citizens of Quebec. It is true that opposing this amendment runs contrary to the designs of the government of Quebec. However, when a government intends to deprive its people of their natural rights, it is the obligation of the individual to oppose these actions. That is what has prompted us to prepare this defence of the rights of the individual Canadian.

We have shown who the losers are in this constitutional game. Who are the winners? The 10 premiers have won. Their insatiable lust for increasing their power has been gratified temporarily. In the future, other separatist premiers, such as Jacques Parizeau, will have the power to enact separatist legislation against the wishes of the people of Quebec. The 1987 constitutional amendment is sovereignty-association. It has turned every Premier of Canada into a closet separatist. To support this amendment is tantamount to supporting the breakup of Canada.

We can only end this dissertation by asking, what would possess you to support this egregiously flawed document?

**Mr. Chairman:** Thank you very much for your presentation and for picking up on a couple of points that perhaps have been touched upon but have not been discussed in quite the detail that you have here in terms of the growth of bilingualism, and some of your comments on various demographic shifts and changes, French-immersion programs and so on.

Let me begin with a question which flows from the group that was here before. I think you are speaking to this issue as well and I am not sure if



there are not some contradictions. I do not mean in what you said, but as sort of part of Canadian society, I suppose. That is a desire we all have, which I think has been further underlined since 1982 with the charter, in our sense of how important it is as individuals that we have rights. Those are critical because we do not know from one decade to another what kind of government we are going to have. That affords, if not ultimate protection, at least some protection.

By the same token, there is the concern that has been expressed historically from Quebec about the need for some ability in that province for the government, which is the only one that represents a French-speaking majority, to have some tools that it feels can protect itself. I guess those often get defined as collective tools. Clearly, there is always going to be a tension between the desire to protect the collectivity and to support and protect the individual's rights.

Mr. Allen has referred at different times in some of our discussions to the Quebec human rights statute which probably goes further than does any other province, I think, and even than the charter in many of its protections. While perhaps historically at times one has thought that the Quebec government has been less careful of protecting human rights, at least in the more recent past that has not been so.

I am just wondering, in dealing with the concept of the distinct society—that concept which Quebec had put forward from the 1970s as a need for protection—is it your feeling that you cannot have in the Constitution some such designation, or is it the way that it has been done? Is there some way of providing to Quebecers some statement that indicates an understanding of a different kind of collective problem that they may have and we do not? How do we find that sort of balance between what I would think is a legitimate need on their part to protect the collectivity and, at the same time, the protection of individual rights? I would be interested in your reflections on that.

**Ms. Need:** I will go first and then I think everyone may want to comment on this.

**Mr. Chairman:** Fine.

**Ms. Need:** First of all, we stated in our paper that we feel the province of Quebec and its government already have sufficient powers to protect the French language in that province. They have attempted to utilize them and they have been successful for the most part. The Supreme Court has not agreed with every provision. However, I think overall Bill 101 has certainly been accepted.

Second, I do not think that the “distinct society” clause belongs in the Constitution because, as we stated, it is only a snapshot in time. That may be the reality in 1987, but to suggest that we will force that, carve it in stone and capture the wind and say, “This is the way it must always be,” is ridiculous. We know that with the declining birth rate in Quebec, the predictions are that in 100 years people of French origin may not be the majority any longer in the province. That is not to say that the government cannot promote the language itself, but I do not think you can force a particular culture on infinity because it happens to be a reality today.

In Ontario, I know that if you have been here for more than seven or 10 years, you can walk down University Avenue and be fair skinned and be startled to see that you are increasingly in the minority. If Quebec says, “We must protect this snapshot in time,” what prevents Ontario from saying: “Look. We were once the majority in this province. We have rights. English should be the language. Why can't Ontario make itself a predominantly Anglo-Saxon province to protect its culture?”

**Mr. Chairman:** Can we just let them finish the answer and then we will—

**Ms. Need:** I know it is a free-for-all. Go ahead. I just do not think that has any business being in the Constitution because culture is an evolving thing and it cannot be imposed upon people.

**Mr. Chairman:** Just before a supplementary, I think the gentleman wished to comment.

**Mr. Shulman:** Generally, I agree with Ms. Need. No, there is no need for it in the Constitution. It is almost stating an obvious point, but it undermines the very principle. The Ukrainian community in Saskatchewan is a distinct society. We go across the country and we keep coming up with distinct society after distinct society. What makes this one distinct society different? Canada is a distinct society. The whole tradition of Canada is that we are the mosaic. Everywhere in Canada there are distinct societies. Why place that in the Constitution? That is a fact of Canada. Multiculturalism protects that distinctness and it protects every group.

In terms of the whole collectivity question, my God, that is what governments are all about. They do protect the collectivity. That is what they exist for. The one thing that individual rights are all about is to protect people from excesses of that collectivity, from a form of dictatorship of the majority. It is to make sure that the minority

has a means to fall back on. They can go into the courts and say, "Look, government has gone too far this time." The courts can say: "You know something? You are right. Government has gone too far this time. This law or this section of this law has overstepped the boundaries that are provided for within the Charter of Rights."

I think the government of Quebec has proved that it is able to protect the collectivity within that province. The language laws, all of the legislation that has been passed since the beginning of the Quiet Revolution demonstrates how Quebec's governments have been able to respond collectively, or to that collectivity. I do not think there is a need in the Constitution for anything other than the fact that governments are going to exist and they have these powers. That answers the whole problem, as far as I am concerned.

1550

**Mr. Chairman:** Mr. Offer has a supplementary.

**Mr. Offer:** With respect to your response on the whole question of a distinct society, you were limiting your question to language solely. I take it as a given, surely, that there is much more to a distinct society than the language. I am wondering if that is just for me to imply in your response, or does "distinct society," for yourself and for your position, merely centre on the language primarily in Quebec?

**Ms. Need:** I just have my notes. I gave Mr. Beer a copy of Eugene Forsey's analysis of the report of the joint committee on the Constitution, which is your federal counterpart. He quotes Mr. Bourassa, which was a quote by Mrs. Finestone, who is one of the MPPs from Quebec.

**Mr. Chairman:** Have you a page reference for that?

**Ms. Need:** It is page 11, the third or fourth paragraph, starting "Above all." This is quoting Mr. Bourassa himself:

"The French language constitutes one fundamental characteristic of our uniqueness but it has other aspects, such as our cultural, our political, economic and legal institutions. As we have so often said, we did not want to define all these aspects because we wanted to avoid reducing the National Assembly's role in promoting Quebec's uniqueness.' Not so much as a hint here of bilingualism, biculturalism, multiculturalism, the aborigines; but more than a hint that the phrase 'distinct society' was intended to cover a very wide field."

That is Mr. Forsey's interpretation, and I think everyone is very well aware of the great esteem in

which Mr. Forsey is held when it comes to constitutional matters. He goes on: "All the attempts to show that the 'distinct society' means very little ring hollow upon examination. If it really means so little, what is it doing there at all?"

**Mr. Shulman:** If I can respond to that as well, yes, "distinct society" is a lot more than just language, but what makes any society function is not so much what the government puts in place, as what the people do, and that is fine. The people out there create what is distinct about their society. They create their own institutions. They create the clubs, the organizations, the events that are going to be held that make them very distinct. In a sense, they also create the process by which the people within that community interrelate with each other.

That is fine; that is great. What I object to is the idea of a government getting involved in creating those institutions, creating the forms of interrelationship, creating the events and dictating what those are going to be. Leave it up to the people. It is done in a rather informal and very effective manner right now. There is no need to change it. That is what the "distinct society" clause does. It lets the government start to dictate what those things are going to be, and there is no need for the government to do that. The people do that rather well.

**Mr. Allen:** I would like to take off from that point, but I would like to say I appreciate the brief very much because it adopts a singular principle, namely, that individuals are never obliged to give up everything to their governments. Whatever the social contact is, they always hold in reserve themselves, their essence as individuals and, therefore, they have inherent rights that always can be counterpoised and they must have the institutions to express those rights over and against the power of government.

But I would submit that, from my point of view, your paper in effect rides that proposition too far. I wonder if you are not caught on the horns of your own definition, if I can put it that way. You just said that the people create their own institutions, and I agree. That is the healthy base of culture and that is the way it happens. No government should be given the power simply and purely to meddle and distort and enforce those structures.

At the same time, is it not true that those same people create, as you said, institutions? Among those institutions are their governments and their political parties. Is it not true that the terms that we have been given by the people of Quebec in



recent years have been essentially one of two terms?

One is that the Canadian federation somehow accommodates itself to the concept that Quebec especially does stand for something that is a bit different in Canada, has done so historically and continues to do so; that the trend of the use of French in the French population in Quebec has been up and not down, in terms of proportion over the long haul; and that they want us to recognize something special there that is sometimes called special status.

The other option is something much more extreme, namely, a rather significant separation of that entity constitutionally from the body politic of Canada. That is what those people have been saying through their politics. If they have been saying that to us through their politics, how can we then, in a paternalistic way, if you like, turn around and say to them: "Sorry, it doesn't mean anything. Your government doesn't mean anything. It is something different from all those other institutions that you have created, which you guys ought to keep as free and free-flowing" and all the rest of it?

Is there not a fundamental contradiction in what you are saying and are we not getting ourselves into a major problem when we put ourselves over and against the people of Quebec when they try to express themselves through their parties and through their governments in those ways?

**Mr. Sloly:** There is definitely a case, when you speak to people in Quebec, of speaking out in favour of a particular vision or protection of their culture and language. The problem is not that there is a need to enhance the power of the government of Quebec. The problem is that French Canadians, as a group, only felt secure inside the province of Quebec.

The real problem is not whether to increase or decrease the powers of the government of Quebec. The problem is, how do we protect the French culture in Canada? This accord does not, to me, protect the French culture in Canada. Looking into the future, if anything, it threatens the French culture in Canada. It threatens French culture in North America because it ghettoizes French Canadians or it tends to increase the tendency to ghettoize French Canadians in Quebec.

If the constitutional accord were intended to protect the French culture in Canada and in North America, it should have encouraged the use of French and the French culture outside of Quebec. This accord creates the idea that Quebec is a

distinct society and, also implicit in that, that the rest of Canada is a distinct society in a manner that is opposite or certainly contrary to that in Quebec.

To me, it does not encourage and certainly gives an excuse or motivation to narrow-minded people in provinces that have a very small French population to say, "Well, OK, they've got their agreement." In effect, it entrenches the idea that there are two Canadas and that they are geographically defined. To me, it does not encourage, it only discourages open-mindedness on the part of Canadians outside of Quebec.

If French culture in this country is to survive, it has to go beyond the borders. It has to be enhanced beyond the borders of Quebec. Quebec can survive for the time being, but with the increasing amount of American media—which is largely anglophone, exclusively anglophone in fact—I do not see that a small French population base in Quebec can survive indefinitely. The only way for a culture to survive is for it to expand, but this constitutional agreement only discourages expansion of the culture.

**Mr. Allen:** Then what you are saying essentially is that those people in Quebec who are concerned about their survival as a culture and a language should accept the inevitable, that in North America the majority is going to win. That is one message you are giving me and the last things you have been saying.

**Mr. Sloly:** That is not the message.

**1600**

**Mr. Allen:** We have heard that before. The other side of it is essentially the argument that because you provide services across the country for French-Canadians to feel at home across the country on the Trudeau bilingual model, somehow you have satisfied all the essential needs of the people of Quebec, as they have been expressing it to them.

I submit to you that we have only met some of the needs, that there remains a culture and a community that exists at the grass roots that has been telling us certain things and the minimal terms it has told to us have been this concept of distinct society. It is not even as explicit as special status was in terms of powers sought and demanded distinct from what was to be accorded to other provinces across the country.

If I am to respect the people you say I should be respecting, namely the people on the ground in Quebec, I hear, through "distinct society," the smaller part of their concern about their collectivity. I surely feel obligated to respect that. If I do not, I am also faced with the political reality that

there is a rather larger agenda that could be flowing in Quebec. Without getting into what the prospects of that are in detail, certainly it moves even further in the direction you do not want to go than what we are faced with right now.

**Mr. Shulman:** If we turn back to 1980 for a second there was a government in Quebec which obviously, if we took it at face value, expressed a very clear vision that Quebec should not be part of Canada, that sovereignty-association, however it may have defined it, should be the reality because it was elected. Then we would have had to accept that this was the reality, that this was what the people of Quebec wanted.

However, when the people of Quebec were actually asked whether they supported what their government stood for, we discovered that, no, they did not. They wanted to be part of Canada. When they voted in that referendum in 1980, they did not ask for any special powers. They were simply asked whether the government should start to negotiate sovereignty-association and they said no. They were promised nothing else. Nobody said, "We will have a whole new Canada if you say no." They were promised nothing. It was: "You have been in Canada this long, so why would you want to leave Canada? What would you get out of sovereignty-association, out of leaving the Confederation?" They said, "You are right; we get nothing."

After they said no, the Prime Minister stood up and said: "We are going to try to create something new. Because you have chosen to stay in Canada, we are going to create something that is equal for all people." That is when the Charter of Rights came into place. That, to me, is what protects the society, that so-called distinct society or the French Canadian society in Quebec. They have the charter to fall back on. They can defend themselves through the charter and through the other guarantees in the Constitution.

**Ms. Need:** First of all, in your original statement, you again slipped into the equation—which I understand, because you are a member of the government—that governments equal the people.

**Mr. Allen:** The opposition, thank you very much.

**Ms. Need:** I am sorry. I am thinking as the government of Ontario. You are part of the process. You are an elected member. That is government whether you officially rule or not, in our eyes.

**Mr. Allen:** It is news to me.

**Ms. Need:** You are equating yourself as a representative and Queen's Park as a whole, with all of its tentacles, departments, etc., that you are the people, that what you think equals what the people think. In 1980, as Mr. Shulman has said, it was shown that what the government may think is quite legitimate, the people may not. I understand that having been elected, you would feel that as a representative of the people your opinions are their opinions. I do not think that can be said of any government at any time.

I understand Quebec is the largest province and it is extremely politically valuable for any federal government to woo it to remain in power. It has the numbers. It feels it is distinct because of its language, or culture or whatever it wants to depend on.

I am from Cape Breton. I am from Nova Scotia. I happen to think that as a Cape Bretoner I am different from a mainland Nova Scotian and that I come from a distinct society where not only do we speak English and French, but where there is also a great deal of Gaelic that has been sitting there in pockets for 200 years and they are not losing their language.

When people ask me, I think of myself as a Cape Bretoner first, but that does not mean I take it to the extent that I am no longer a Canadian, or even that the government of Nova Scotia represents me and my opinions. I think that governments of Quebec naturally have a desire of governments to increase their prestige, power and influence. It is only natural. This is what being government is all about. I am saying that it does not necessarily represent, as past events have shown, the individual people of Quebec.

**Mr. Shulman:** I have just one little thing. In looking at the whole principle of government, when we have an election in Canada we elect a government. That government has not been elected to do A, B, C, D, E, F, G for life. We have put our trust in that government. At the end of its term in office it will come back to us and ask us again, "Are you prepared to give us that same mandate to represent you?" We can then answer yes or no to that government. Whatever legislation they pass, if they pass something the people do not approve of and four years later the government is defeated, so be it, and that legislation could probably be overturned.

However, the case here is that this is a Constitution. Two years or four years from now, if the government of Quebec is defeated or other governments of the provinces are defeated because the people do not want this constitutional amendment, nobody is going to be able to say:



"Let us overturn this amendment. We have put in a new government and we can undo this because they did not really reflect what the people wanted."

This is something permanent. Changing this Constitution is going to be impossible in the future because it is going to require unanimity in certain key areas. I do not see unanimity coming when provinces, when premiers are asked, "Are you prepared now to relinquish powers that you have been granted as a result of these amendments?"

I heard an earlier presentation. The reason the 10 premiers were able to come to unanimous consent this time around was because they all got new powers. It was not because for some reason there was a spirit of co-operation. They got power. That was something they wanted and that is something they got. You are not going to get unanimity if they are not going to be given more power. They are not going to agree to give up what they have; they want more. The history of this country is that the provinces, the premiers want more power.

One commentator put it very well, that if Sir John A. Macdonald had offered this agreement in 1867, every province would have been happy to sign it then, including Quebec. This is something Canadian governments have fought against for over 100 years now. This is the first time a Prime Minister has turned around and said: "Sure, let us give more power to the provinces. Let us do this 'distinct society' thing and give the power that goes with this 'distinct society.'"

I would also argue that this "distinct society" clause gives more power than the special status that was argued for before. This negates the Charter of Rights. They have been given the power in terms of preserving and promoting their "distinct society" to do whatever they see fit, regardless of what it states in the charter. They have clearly stated here that the charter comes in second compared to this clause, with the exception of multicultural and native rights which, of course, are not really defined.

I do not see how we can turn around and support the government of Quebec stating that this is what it wants, that this is what the people of Quebec want. I am not sure this is what the people of Quebec want. I will tell you something else: I will bet you this is something another distinct society in Canada might want. I will bet you this is something aboriginal peoples would like. I will bet you this is something the Ukrainian population might want. This is some-

thing the Jewish community might want. This is something the Jamaican community might want.

If you can find them a province where they can take over and become the majority of the population, I am sure they would ask for the same thing within their province. However, it is only within Quebec that we have a cultural group, the French Canadians, that is such a huge majority. In the other provinces, there really is no huge majority. In provinces where there is a nice balance, like New Brunswick, we have the adoption of Acadian and Anglo cultures, basically equal, where they have accepted official bilingualism, where they are the only province that is officially bilingual, because it is the reality of their province.

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I am worried that this "distinct society" clause is going to step on the other distinct societies in Quebec: the English-speaking community, which is not in and of itself a distinct society; there is an Italian community and a Jewish community. I also do not like this idea. Somehow or other, everywhere else in Canada is another distinct society. I have lived in Alberta, Saskatchewan, north, south, Ontario, throughout this province. I will tell you, I felt I was in a different society and a different culture in the different places I lived in. Within a province, moving from the northern end of the province where there are native communities to a southern rural community, I felt I was in two different societies with completely different cultures and yet there was some underlying thing that made them all the same. We are all Canadian.

This "distinct society" thing says: "No, we are not all Canadian; they are Quebecers." We have got into the habit of the Prime Minister standing up and saying, "This is what Canadians and Quebecers want," as if somehow or other there are two different people, two nations in this country of ours. This is one nation. That is what the people want. That is what the people of Quebec have said they want. They said it in 1980 and I do not see where they have ever asked for anything different since then.

The Prime Minister of Canada, Pierre Elliott Trudeau, gave them the Charter of Rights to defend themselves. I do not know why the heck we are deciding to take it away from them. While we were just getting used to having this charter and seeing it have an impact in this country, seeing individuals suddenly being able to stand up for their rights and get something individually that they were unable to acquire before—to defend themselves, because they could not do it

before—suddenly they are being told, “We are not going to let you do it in the future.”

I will grant that there are no governments in this land today, with the possible exception of British Columbia, that would do some very extreme things in terms of overriding the Charter of Rights, but I am not prepared to rely on that guarantee for the next governments, for the next people who are elected down the line. I think world history has shown that given the opportunity, governments can rise to power that will do some of the most outrageous, insane things, and the Charter of Rights is the last defence against governments that do that.

I believe we have to preserve that; that Quebec society is protected through its government, through the electoral process, through the legislation that is passed through that government. They do not need a constitutional amendment. They are not weaker than the rest of us. That is the point Pierre Elliott Trudeau kept making. They do not need special guarantees. We are all equal in this country and there is no reason why they, as some form of collective, whatever that may mean, have to be given these special powers. I would like to state that I feel the Charter of Rights is that last defence. It is the power the people have to protect themselves as a group or as individuals. We do not need a “distinct society” clause.

**Mr. Chairman:** I think that in the course of your presentation, and particularly in your remarks just now, you have underlined very clearly your views, which have been set out forcefully in the paper and in the answers to our questions. You have brought a slightly different angle of perspective on some of these issues. We want to thank you very much for coming and being with us this afternoon and for presenting not only your paper, but also the copy of Eugene Forsey’s remarks. I think we have a distinct idea, if I can put it that way, of your thoughts and views and we thank you for them.

I now call upon Lynda Palmer to please come forward and take a chair. We have all received a copy of your presentation, Ms. Palmer. Perhaps I will simply ask you to proceed with your presentation and we will go ahead with questions after that.

#### LYNDA PALMER

**Ms. Palmer:** I would like to begin by thanking you for the opportunity to speak with you this afternoon.

I come before this committee not as a lawyer or a constitutional expert but as a very ordinary

Canadian who is deeply concerned about a number of provisions within the Meech Lake constitutional accord, outraged at the undemocratic process by which my Constitution is being amended, and finally, saddened by what I believe will be the devastating impact of this document on my country.

The components of the accord with which I am most concerned are individual and equality rights, an alteration in the balance of powers, the opting-out clause and the amending formula.

Let me begin with individual and equality rights. The “distinct society” clause and section 16 may have a very detrimental impact on individual and equality rights. It is my sincere wish, as is the wish of all Canadians, to see Quebec’s signature on our Constitution. I am quite aware that to this end some compromises must be forthcoming, but not at the expense of individual rights or of the country as a whole. I do not believe Quebecers would want this either.

Section 16 of the accord specifically exempts existing multicultural and native rights from being affected by the accord. This leaves an opening for judicial interpretation that other individual rights, of women, minorities, the disabled and so on, are affected by these provisions.

Maybe we could look at the infamous Lavell case of 1974. Indian women challenged their loss, by law, of their Indian status when they married non-Indian males. The Supreme Court faced the question of whether a woman’s equality interest should prevail over the interest of a group of which she was a member. The majority of the court ruled against the equality argument, saying that the federal government had the constitutional right to impose requirements that discriminate against women. That the Lavell case is about the conflict between sex equality rights and one type of distinct society is clear from Justice Laskin’s words, “the paramount purpose of the Indian Act to preserve and protect the members of the race is promoted by the statutory preference for Indian men.”

It is widely recognized by constitutional experts that section 15 of the charter was designed to prevent a repetition of the unfortunate reasoning of this case. Now, two years after section 15 came into force, women are wondering whether the wheel has come full circle.

If indeed the “distinct society” clause and section 16 were not intended to override or supersede women’s rights, why not make that crystal clear now? We cannot afford to risk a future court interpretation that would impact



negatively on women's rights. Clarity could be achieved by deleting section 16 and adding a provision which says that charter rights prevail over the accord.

My second area of concern is the alteration in the balance of powers. Too much power is being transferred to the provincial arenas. Some of these additional powers will come through the province's ability to name provincial representatives to the Senate and the Supreme Court of Canada. This is an incredibly profound alteration in our constitutional framework.

I recognize that Canada is an extremely vast country with diverse regional strengths and weaknesses, and each province is, to me, distinct in its nature. In order to meet each province's specific needs, there must be some decentralization within our constitutional framework. We are in fact highly decentralized now. The Meech Lake constitutional accord ravages the federal government, leaving it weak, impotent and powerless to speak and act on behalf of the country as a whole.

Senate and Supreme Court appointees will owe their allegiance to the province which put them there and they will be impaired in their ability to make decisions according to their conscience or for the best interests of the country.

Former Prime Minister Pierre Trudeau warned that "with too much decentralization in the name of cultural security and provincial autonomy, the country risks fragmentation and disorderly competition in a world where, to an increasing extent, only the strongest and most-disciplined can survive and prosper."

The section of the accord which provides for this method of legislative and judiciary appointment should be deleted.

My third concern is the opting-out clause. The accord probably makes it impossible for us to have national cost-shared programs again in areas of education, skills training, welfare and so on. One cannot help but be concerned about what will happen to our health care system.

The accord allows provinces not to participate in national cost-shared programs "if the province carries on a program or initiative that is compatible with the national objectives." The vagueness of this statement raises a number of questions: Who will define "the national objectives?" What do "initiative" and "compatible" mean?

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Standards which have been so instrumental in the success of national programs such as medicare are not mentioned at all. The health

care system in our country is a cost-shared program, which Canadians are truly proud of and value tremendously. It reflects a philosophy common to all Canadians and is about ourselves as a society.

No matter on which side of the abortion issue each of us stands, it is difficult to ignore and not be disturbed by the inequalities from province to province related to access to the health care system for women since the Supreme Court handed down its most recent decision on abortion and women's rights.

Whereas right now the federal government has funding leverage and is thereby able to ensure that standards such as accessibility, portability, comprehensiveness and universality are being met, this is unlikely to be the case under the Meech Lake constitutional accord.

This opting-out provision, with such lack of clarity, leaving so many questions unanswered, is difficult to amend and therefore should not become part of the Constitution.

My last area of concern is with the amending formula itself. The accord alters the future amendment procedure by requiring unanimous consent of all the provinces to change significant national institutions such as the Senate, the Supreme Court and the establishment of new provinces.

Consensus was achievable in striking this accord because Mr. Mulroney gave everything away to the provinces. The federal committee which conducted hearings this past summer identified flaws in the accord and went on to say that the premiers and the Prime Minister should move to fix them at next year's constitutional conference.

Obtaining unanimous approval is extremely unlikely in the future, and the ability therefore to correct these flaws becomes highly unlikely. We should therefore return to the amending formula in the current Constitution for all constitutional amendments: consent of seven provinces accounting for half the national population.

Let me finally express my outrage at the process which has been utilized to amend my Constitution.

It was not made known to Canadians that serious discussions about amending the Constitution of Canada were taking place until the press published Mr. Trudeau's comments on May 27, 1987. The accord was signed by the provincial premiers and Mr. Mulroney one week later, on June 3, 1987. By August, the federal government was busy making a show of holding public hearings. This compressed timetable, however,

did not allow individuals and groups the necessary time to study the impact of the accord and prepare statements. It is extremely disturbing now to hear Mr. Peterson's repeated rejections of amendments while these hearings are still in progress and before this committee has had an opportunity to make recommendations.

There are flaws and ambiguities in the Meech Lake constitutional accord which will have serious implications for all Canadians. I love my country very deeply, and I cherish all that being a Canadian means. My Constitution is the framework upon which the fabric of this nation is woven and its design determined. It impacts on me, Lynda Palmer, in my day-to-day activities and my relationships.

Why would we want to endorse, knowingly, such a flawed document? I am painfully sensitive to the emotions and risks involved in seeking amendments now. I am sorry that Canadians were not allowed to participate before this accord was signed on our behalf in the first place. It is, however, my firm conviction that we are risking our nationhood if we endorse the accord in its present form, and I believe if we do not seek amendments now, later will be too late.

**Mr. Chairman:** Thank you very much. I also want to note that a number of groups have come forward, but we are particularly appreciative when individuals take the time and effort. I am sure if one has not done it before, there may be something somewhat intimidating about coming before some legislative committee. We do appreciate your coming and making your present.

We will begin questions with Miss Roberts, followed by Mr. Eves, Mr. Breaugh and Mr. Keyes.

**Miss Roberts:** Thank you very much for your presentation. It was interesting and certainly must have taken a lot of thought and a lot of research on your part to come forward with such an all-encompassing group of thoughts.

It would appear that you fear a change of the balance of power. Indeed, if you look at sections 91 and 92 of the British North America Act which set out the various areas of jurisdiction, what you are suggesting is that there be a change with respect to how those are set out now. You do not like them.

**Ms. Palmer:** That is right.

**Miss Roberts:** OK. You want to change the Constitution anyway, whether we do it through Meech Lake or someplace else.

**Ms. Palmer:** No. How it was before this was fine.

**Miss Roberts:** But there are certain areas that are exclusively the jurisdiction of the provinces, such as health care accessibility. You do not want it to be the jurisdiction of the provinces. You want that to be a completely Canadian program. You want there to be something to force each province to have the same type of health care system.

**Ms. Palmer:** I think we have that in the current system as it is now. If you look at some of the initiatives and so on that have gone on, the federal government does have funding leverage because they are cost-shared programs.

**Miss Roberts:** I know, but it is only as a result of negotiation between the two. It is the exclusive responsibility of the provinces and they have been allowed to negotiate. That is all I am trying to point out.

**Ms. Palmer:** But they have been able to establish standards that they have taken stands on, which have made them universal and accessible throughout Canada, whereas they would not have been before.

**Miss Roberts:** But you still want to change the difference between the exclusive jurisdiction that the province has and the exclusive jurisdiction that the federal government has. You want a stronger national government. Is that not correct? You want more national programs that make it easier for people to have the same level of social services across our country.

**Ms. Palmer:** No. I did not say that.

**Miss Roberts:** OK. You do not—

Interjection.

**Miss Roberts:** OK. I will not pursue that any further.

The other question I want to ask you is: you do not believe in the independence of the judiciary either; you feel that whoever appoints them, they owe their allegiance to that person?

**Ms. Palmer:** Yes, I do.

**Miss Roberts:** OK; thank you.

**Mr. Eves:** I would like to thank you for your presentation. It is kind of refreshing to see someone who is not a lawyer or a constitutional expert appear before the committee—an ordinary Canadian, as you put it. I think it is a very thought-provoking and sincere presentation; I think you should be complimented for it.

**Ms. Palmer:** Thank you.

**Mr. Eves:** I would like to touch upon a few areas of your paper. I quite agree with the comments you make about clause 16. It is a viewpoint shared by many groups that have



appeared before this committee, regardless of what their own interests were. There is undoubtedly room for some clarification about the protection of rights under the charter in clause 16 of the Meech Lake accord.

You commented about the legislative and judiciary appointments. There is another facet there that you did not touch upon, that people from the territories, be it the Yukon or Northwest Territories, are Canadians as well and by this process for all intents and purposes are excluded from appointment to either the Supreme Court of Canada or the Senate, assuming that a provincial Premier is going to be far more likely to recommend somebody from his own province as opposed to somebody from a territory.

The opting-out clause, I think, is one that really goes to the heart of the whole Meech Lake accord. You have been sitting back there this afternoon and for some period of time this morning, I believe, and I am going to ask you the same question I have asked several other groups: do you think that this clause, in your opinion, could be rectified by reinstating the word "standards," as opposed to "objectives," or do you think that the opting-out clause the way it is now is so unworkable, from your point of view, that even that would not save it?

**Ms. Palmer:** Putting the word "standards" in there would make it much more acceptable to me.

**Mr. Eves:** While I may agree with your comment about the amending formula, I think your chances of getting that changed now are probably slim or none in reality, once the 10 premiers have agreed to it. I think your comments about the process are very valid.

I guess this is the last question I would like to ask you. If these areas you have addressed your concern to were addressed by the way of amendment, would you be satisfied, or do you think, as do several other groups and individuals that have appeared before this committee, it is such a mess and because there has not been any public input prior to the drafting that we should maybe be starting from square one all over again? Which would be your preference?

**Ms. Palmer:** These are only four particular areas that I felt I could comment on from a little bit of a knowledge base. I do have other concerns. Immigration is another area. I think it is a mess, basically. I think it needs to go back to the drawing board.

**Mr. Eves:** Thank you.

**Mr. Keyes:** I just might say to Ms. Palmer that I am sure her presentation here—which is, maybe unbeknown to her, watched by thousands across the province at this moment, and now that you have been able to get through it all so well—will help to prompt more of the citizens to come forth.

Is it fair for me to say from the total context of your paper, though, that you would be happier if the Meech Lake accord had never been seen and if everything carried on as it was before? I do not want to read too much into it, but as you have said to delete one item and return to the amending formula, I seem to sense that you would have been very happy if we had kept everything exactly as it was prior to Meech Lake beginning. Yet I wonder, if that is your point of view, how you can rationalize that with the number of concerns that have been expressed by different groups across the country with regard to their position in Confederation.

I just want to narrow that in, after you answer that, to the one particular point about reform of the Senate or the Supreme Court, because even in there you have suggested that the appointment or a recommendation by the provinces is inappropriate, since it would tend to bias the judges of the Supreme Court in dealing with decisions. What type of change, if any, do you feel would be appropriate in the appointment either to the Senate or to the Supreme Court?

Take the first part about your general feeling, because I want to be corrected; that is the way I have viewed your papers, you felt the status quo would be much better.

**Ms. Palmer:** OK; let me start with that. Not exactly status quo, because I think we have an obligation to negotiate and try to achieve Quebec's signature on the Constitution, and so in that sense no. I am a little bit familiar with some of the five points that Quebec had been saying it wanted in order to come in. Obviously those have come out in this, and I am not in favour of those, so I guess I am saying that while I realize some compromise is necessary, what we ended up with here is not acceptable to me.

**Mr. Keyes:** Because it went too far.

**Ms. Palmer:** I think we went too far. As someone else noted, this word "distinct" keeps coming up, but we are all very different. If you have gone to Newfoundland and tried to understand Newfoundlanders, you know their language is also very different and they have a very distinct culture, but I do not think we should say that. This country has to be more than just the sum total of a bunch of little distinct provinces. There has to be something that we all buy into. I

think that was beginning to happen. But Mr. Mulroney too freely gave everything away. I do not think there was the strength, from the federal perspective, as a leader of this nation, to do some nation-building; he too quickly gave everything away.

**Mr. Keyes:** Can you turn to the one on Senate reform then, because again I suggest you do not indicate any alternatives but rather leaving it the way it has been.

**Ms. Palmer:** The reason I commented on it the way I have is the fact that that method of appointment gives more strength to the provinces, and I think that still has to be federal in nature. I am nervous about having a list of names submitted by the provinces from which the Prime Minister will choose.

I work in an organization that is very complex. I work in health care. If the president of my hospital told each department in the hospital to submit a list of names for her that were going to be empowered with those kinds of decisions, boy, the name I put forward—and I think that is human nature—you would want to think he was representing your interests, and I do not think that is necessarily the best thing for the country as a whole.

**Mr. Keyes:** But you have some protection if there is one to be chosen and seven names are submitted. You have a broad range of qualified people. You then have a much better chance of impartiality to some extent.

You do not make any reference to the Senate. Do you feel that the Senate, as it functions today, is appropriate without any changes in either the appointments to the Senate or the way it operates?

**Ms. Palmer:** I do not feel sufficiently qualified to answer that. I know there are a number of people who are interested in a triple-E Senate. I cannot honestly tell you whether I think that is a good idea because I do not know the issues well enough. But again, I worry that with the amending formula, if this is not right how in the world are we ever going to change it? I do not think you are going to get a unanimous decision again.

**Mr. Keyes:** Perhaps in summary then, you are not so much opposed to the fact, and acknowledge the fact that a constitution of any country is an ongoing developmental process, but the amending formula as now proposed would make it much more difficult to ever have any continued development in the future.

**Mr. Breagh:** You are making a believer out of me that we ought to exclude all the lawyers and constitutional experts in this process. You are the first person who has been smart enough to admit that there was actually something in here that you do not know.

I share a lot of the concerns you have expressed, particularly the ones about the process. In part, it is unrealistic to expect everybody in this country to know that bureaucrats met and committees met, and all of that happened. I think what stands out for most people is that the bare, blunt truth is that 11 people went behind closed doors and drafted something, and even though that was revised somewhat, you just cannot escape that. The process that we are in now is certainly not the most desirable one, but there is a threat that democracy might break loose somewhere in the country. At least there is a set of public hearings here in Ontario.

I want to talk just a little bit with you about this amending formula stuff because one of the problems I have is this: with all the difficulties I have with the accord and the process, and who is left out when we get to it, I would be comforted somewhat if I felt there was a way to fix it. When you read the fine print on the amending formula, you find that it is not as bad as some people portray it. You do not need unanimous consent on everything; you would use the existing formula. If it was good enough last year, it is probably going to be good enough next year. You still get down to a point where it does require unanimous consent for some things. I am struggling with this notion. I am particularly struggling with the notion about the admission of provinces, for example. How is that going to work?

I want to get your response to this: the one thing that has occurred to me is that the current amending formula and the one that would apply if we excluded the unanimous consent thing is that seven of the provinces and 50 per cent of the population could make the change. What would happen if we designed a new Canadian Senate with real powers and half the people in Canada did not agree with that? Could we proceed? Certainly, if we used the amending formula, we could do that. But could the Senate or the Supreme Court really function if half the population of the country did not agree with that change? In that light, this unanimous consent thing takes a little different form. In other words, if you are going to make major changes in really important federal institutions, in those carefully lined-up areas, maybe it is necessary to have



unanimous consent. In that light, how would you feel about that?

**Ms. Palmer:** I would be concerned. I hate to use Prince Edward Island because it gets used all the time, but with this unanimous amending formula, how do you feel about having that small percentage of the population of this whole country stopping something?

**Mr. Breagh:** That is true. I will just pursue this for a bit because I think it is important. If, for example, we said that three of the 10 provinces or representing half the population, which is possible, did not like the proposal for changing the Supreme Court of Canada—they represent provincial governments, they have a large percentage of the population behind them, they could very well take it into litigation. In other words, they could go to court and many of them would. Some already have done this kind of thing.

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I am seeking your view of this thing because I am perplexed by it. I originally saw the unanimous consent provision as being totally improper, but the more I think about it, the more I think that if we do not get unanimous consent going in for major institutional change, like the Supreme Court or the Senate, the other option is that the governments that are left out will retain the right to go to court and so will all of our citizens; and that if it is not a clear, flat-out consensus we are operating with here, it is off on the wrong foot for starters.

As someone who is not a lawyer and a constitutional expert, I would like to hear what would be better, to leave the current amending formula and let people go off to court and sue that the changes to the Supreme Court of Canada are not wise and should not proceed and that the changes proposed to the Senate—maybe a little bit more than most of the people in Canada—are wrong. That is the bind we just got out of.

**Ms. Palmer:** It seems to me that the amending formula we were working with before Meech Lake was better able to represent the country as a whole. In other words, it was more representative of the population.

**Mr. Breagh:** Yes, in most instances.

**Ms. Palmer:** From my limited knowledge and the way I see it, that would be far preferable to me.

**Mr. Breagh:** Just give me one more quickie. I think I could generally ascribe to that point of view. The difficulty is that the reason we have Meech Lake, to be blunt about it, is that one province, one out of 10 in Canada, objected to

the previous constitutional changes. That brought us to this situation with this amending formula, seven provinces and half the population. One province stood us on our ear. If we proceed with changes in federal institutions like the Senate and the Supreme Court without all our provinces agreeing that those changes make sense, we would have this same situation extrapolated every time we made a major change in a governmental institution.

I do not know how practical this unanimous consent thing is, but I am beginning to see the other side of the story, that if we do not have unanimous consent before we make these changes, we leave ourselves open to the same situation happening again and again, so that every time one big player does not like the changes that are proposed, we may be into another Meech Lake deal.

**Ms. Palmer:** I think you will agree as well that the people of Quebec have not voted on this either.

**Mr. Breagh:** Yes.

**Ms. Palmer:** It has not been put to the population. It is the premiers and the Prime Minister basically who hammered it out and signed it.

**Mr. Breagh:** Yes. This has happened a couple of times today. To be fair, we ought to put on the record today that every single member of the Quebec National Assembly voted for this accord. As much as I would like to portray Boo-Boo Bourassa as a bad person, he is not alone in this instance.

**Mr. Cordiano:** I will not take up much of the committee's time. I just wanted to congratulate Ms. Palmer for coming before the committee. We have had some discussion with regard to some of the points you have made. I respect most of the things you have put forward. I want to tell you that your brief today is very thorough and I also want to let you know that one of the things we are grappling with, apart from some of the very important issues you have pointed out—you touched on this briefly as you went through your brief—is the whole question of process.

We, as a committee, are looking at that to try and come up with some recommendations for future constitutional reform and what mechanisms, processes or forms those might take place. I think there is some room for us to make recommendations that are meaningful. We will probably be struggling with this when we write our report, trying to come up with just how to go

about changing the Constitution in a process that makes sense to the average citizen.

I think part of the problem we are having with this is the way in which it was arrived at. People felt as though they were left out and certainly I can see where people would feel that way. On the other hand, I was just taking note this morning—I asked one of the witnesses, a very learned professor, this question—that the fact is it has never been done any other way in this country. Constitutional change has always taken place with a select group of people, namely the premiers of the various provinces, the federal government and the Senate, the upper chamber, involved in constitutional change. That is the way it has taken place.

I think what we are dealing with here is a new reality, something that is evolving into something that we have not seen in the past. Perhaps there was more flexibility with a number of groups making presentations before the federal government prior to 1982, prior to the repatriation of the Constitution. There was some room for people to make presentations; I think that took place. But I think it is essential to come up with new mechanisms now. That is something we can perhaps work with.

I wonder if you have any thoughts or ideas on that. We never discussed this in the past, but I wonder if you have any further thoughts on that.

**Ms. Palmer:** I do not have any brilliant ideas. I was interested in the professor, though, who suggested—he was talking about Ontario but I assume he meant provincial—

**Mr. Cordiano:** This afternoon.

**Ms. Palmer:** I would be interested in learning more about that. I do not have any bright ideas myself, but I think it is important somehow to get

the people more involved before it is already a fait accompli.

**Mr. Cordiano:** Do not feel bad. None of us do. We are all dealing with this in a very difficult way. Thank you very much for coming today.

**Mr. Chairman:** It is sometimes overlooked, but those of us who do at some point in our lives manage to get elected are also in many respects ordinary and do not have—

**Mr. Breaugh:** Some real ordinary.

**Mr. Eves:** Some less than ordinary.

**Mr. Chairman:** We are not by any means expert in many of the things we deal with and I think there is merit to that. Indeed, that is probably the way it should be. I think a lot of the questions you have had—as Mr. Breaugh said, we really appreciate your frankness at times in saying, “I do not know,” or, “I have to think about that,” because we are really in that situation. As we go through these hearings, we hear a great many things we have not necessarily heard before, or perhaps not in that context or that we are wrestling with. We appreciate it then when you come forward, as have others, and say, “I do not necessarily have all the answers, but I am very concerned about my understanding of these different issues.”

I again want to thank you for taking the time in preparing this submission, being with us this afternoon and answering all our questions.

**Ms. Palmer:** Thanks for your attention.

**Mr. Chairman:** The committee will stand adjourned until 10 o'clock tomorrow morning in this room.

The committee adjourned at 4:47 p.m.



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Greene, Dr. Ian, Assistant Professor, Department of Political Science, York University

**From the Women's Centre, University of Toronto:**

Freeman, Lisa

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